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Judicial Council of California Criminal Jury Instructions

CALCRIM 2006–2007

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Series 100–1800

Judicial Council of California
Task Force on Criminal Jury Instructions

Hon. Sandra Lynn Margulies, Chair

LexisNexis Matthew Bender
Official Publisher

This edition includes all new and revised criminal jury instructions acted on at the Judicial Council of California meeting of August 2006.

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Preface

These instructions represent the work of the Task Force on Jury Instructions, appointed by Chief Justice Ronald M. George in 1997. Our charge was to write instructions that are both legally accurate and understandable to the average juror. The eight-year effort addressed a need for instructions written in plain English and responded to the specific recommendation of the Blue Ribbon Commission on Jury System Improvement that observed: "jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror."[1]

The reason instructions are so often impenetrable is that they are based on the language of case law and statutes written by and for a specialized legal audience and expressed in terms of art that have evolved through multiple languages, in many countries, over several centuries. We do not seek to lose either the majesty of the law or the rich language in which lawyers and judges have expressed it. However, our work reflects a belief that sound communication takes into account the audience to which it is addressed. Jurors perform an essential service in our democracy. We are absolutely dependent upon them to apply the law fairly and accurately. In order to do so, they must be able to understand the instructions they are asked to follow.

These instructions were prepared by a statewide committee of justices from the Court of Appeal, trial court judges, attorneys, academicians, and lay people. They are approved by the Judicial Council as the state's official instructions pursuant to the California Rules of Court.[2] The Rules of Court strongly encourage their use.[3]

Each instruction began with the preparation of an initial draft, followed by subcommittee review and full committee consideration. The task force was assisted by a remarkable group of staff attorneys that included Robin Seeley, Natasha Minsker, Jeffrey Shea, Melissa Johnson, Elizabeth Givens, and Lisa Lockyer. Throughout our multi-year effort, drafts were repeatedly circulated for public comment. The task force reviewed thousands of observations, and this final product reflects the input of judges and lawyers throughout California. We are grateful for the willingness of prosecutors, defense counsel, appellate specialists, judges, and justices to share their insights and the benefit of their experience.

A list of people and organizations who have contributed to this undertaking follows this preface; we apologize to anyone who has been omitted through oversight.

The official publisher of this work is LexisNexis Matthew Bender. Its representatives have worked closely with us to prepare the instructions and to

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[1] Blue Ribbon Commission on Jury System Improvement, Final Report (May 1996) p. 93.
[2] Cal. Rules of Court, rule 855(a).
[3] *Id.*, Rule 855(e).

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create a software platform for their usage. We have been greatly aided by their efficiency, professionalism, and commitment to excellence. We particularly recognize Bruce Greenlee for his tireless efforts in this regard.

We gratefully acknowledge our predecessor. The Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, published the first edition of California Jury Instructions, Criminal (CALJIC) in 1946. For six decades, their efforts have helped guide the deliberations of California jurors. While we have taken a very different approach to the drafting of instructions, the tremendous contribution the CALJIC committee has made to the California justice system cannot be overestimated.

Like the law on which they are based, these instructions will continue to change. This evolution will come not only through appellate decisions and legislation but also through the observations and comments of the legal community. The Judicial Council's Advisory Committee on Criminal Jury Instructions, charged with maintaining these instructions, welcomes your comments and suggestions for modification.

Finally, I wish to express my personal appreciation for the leadership of Chief Justice George whose vision and commitment have infused this project from its inception and to the remarkable men and women who so tirelessly served on the task force.

May 2005

Carol A. Corrigan
Associate Justice of the Court of Appeal
First Appellate District

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Preface to CALCRIM Updates

This edition of CALCRIM includes a number of additions and changes to the instructions that were first published in 2005. In providing these updates, the Judicial Council Advisory Committee on Criminal Jury Instructions is fulfilling its charge to ensure that CALCRIM reflects all changes in the law.

In addition to maintaining the legal accuracy of CALCRIM, the committee carefully considered and implemented suggestions from CALCRIM users. Responding to feedback from users is consistent with the Advisory Committee's goal to maintain CALCRIM as the work product of the legal community. We hope that our many contributors view our role in the same way and will continue to support us.

August 2006

Hon. Sandra Lynn Margulies, Associate Justice
Court of Appeal, First Appellate District, Division One
Chair, Advisory Committee on Criminal Jury Instructions

The Advisory Committee on Criminal Jury Instructions welcomes comments. Send print comments to:

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Guide for Using Judicial Council of California Criminal Jury Instructions ("CALCRIM")

The Judicial Council jury instructions are accurate, designed to be easy to understand, and easy to use. This guide provides an introduction to the instructions and explains conventions and features that will assist in their use.

Judicial Council Instructions Endorsed by Rule of Court
Rule 855 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California. . . .

[The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law. . . .]

[Use of the Judicial Council instructions is strongly encouraged."]

Using the Instructions

Bench Notes
The text of each instruction is followed by a section in the Bench Notes titled "Instructional Duty," which alerts the user to any *sua sponte* duties to instruct and special circumstances raised by the instruction. It may also include references to other instructions that should or should not be used. In some instances, the directions include suggestions for modification. In the "Authority" section, all of the pertinent sources for the instruction are listed, including secondary source materials. Some of the instructions also have sections containing "Related Issues" and "Commentary." The Bench Notes also refer to any relevant lesser included offenses. Users should consult the Bench Notes before using an instruction.

Italicized notes between angle brackets in the language of the instruction itself signal important issues or choices. For example, in instruction 1750, Receiving Stolen Property, optional element 3 is introduced thus: <*Give element 3 when instructing on knowledge of presence of property; see Bench Notes*>.

Multiple-Defendant and Multiple-Count Cases
These instructions were drafted for the common case in which a single defendant is on trial. The HotDocs document assembly program from the Judicial Council's official publisher, LexisNexis will, however, modify the instructions for use in multi-defendant cases. It will also allow the user to name the defendants charged in a particular instruction if the instruction applies only to some of the defendants on trial in the case.

It is impossible to predict the possible fact combinations that may be present when a crime is charged multiple times or committed by different defendants against different victims involving different facts. Thus, when an instruction is being used

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for more than one count and the factual basis for the instruction is different for the different counts, the user will need to modify the instruction as appropriate.

Related California Jury Instructions, Criminal (CALJIC)
The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy. Nevertheless, for convenient reference this publication includes tables of related CALJIC instructions.

Titles and Definitions
The titles of the instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. The title is not a part of the instruction. The titles may be removed before presentation to the jury.

The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions in which the terms appear. When a definition is lengthy, a cross-reference to that definition is provided.

Defined terms are printed in italics in the text of the definition.

Alternatives vs. Options
When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*

The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*

Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: *[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).].*

General and Specific Intent
The instructions do not use the terms general and specific intent because while these terms are very familiar to judges and lawyers, they are novel and often confusing to many jurors. Instead, if the defendant must specifically intend to commit an act, the particular intent required is expressed without using the term of art "specific intent." Instructions 250–254 provide jurors with additional guidance on specific vs. general intent crimes and the union of act and intent.

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Organization of the Instructions
The instructions are organized into 24 series, which reflect broad categories of crime (e.g., Homicide) and other components of the trial (e.g., Evidence). The series, and the instructions within each series, are presented in the order in which they are likely to be given in an actual trial. As a result, greater offenses (like DUI with injury) come before lesser offenses (DUI). All of the defenses are grouped together at the end of the instructions, rather than dispersed throughout. The misdemeanors are placed within the category of instructions to which they belong, so simple battery is found with the other battery instructions rather than in a stand-alone misdemeanor section.

Lesser Included Offenses
Users will need to modify instructions used to explain lesser included offenses. The introductory language states: "The crime of _____ (e.g., false imprisonment) is a lesser offense than the crime of _____ (e.g., kidnapping)." This would replace the standard introductory sentence, "The defendant is charged with . . . ." In addition, the user must add to the end of the instruction on any lesser offense an explanation of the burden of proof as required by *People v. Dewberry* (1992) 8 Cal.App.4th 1017, 1021. That addition is: "The People have the burden of proving that the defendant committed _____ (insert greater offense, e.g., kidnapping) rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of _____ (insert greater offense, e.g., kidnapping)."

Burden of Production/Burden of Proof
The instructions never refer to the "burden of producing evidence." The drafters concluded that it is the court's decision whether the party has met the burden of production. If the burden is not met, no further instruction is necessary. The question for the jury is whether a party has met its properly allocated burden based on the evidence received.

Instruction 103 on Reasonable Doubt states, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." Thus, when the concept of reasonable doubt is explained and defined, the jury is told that it is the standard that applies to every issue the People must prove, unless the court specifically informs the jury otherwise.

Sentencing Factors and Enhancements
Because the law is rapidly evolving regarding when sentencing factors and enhancements must be submitted to the jury, we have provided "template" instructions 3250 and 3251 so that the court may tailor an appropriate instruction that corresponds to this emerging body of law.

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A. GENERAL INSTRUCTIONS

100. Trial Process (Before or During Voir Dire)

Jury service is very important and I would like to welcome you and thank you for your service. Before we begin, I am going to describe for you how the trial will be conducted, and explain what you and the lawyers and I will be doing. When I refer to "the People," I mean the attorney[s] from the (district attorney's office/city attorney's office/office of the attorney general) who (is/are) trying this case on behalf of the People of the State of California. When I refer to defense counsel, I mean the attorney[s] who (is/are) representing the defendant[s], _____ <*insert name[s] of defendant[s]*>.

The first step in the trial is the People's opening statement. The defense may choose to give an opening statement then or at the beginning of the defense case. The purpose of an opening statement is to give you an overview of what the attorneys expect the evidence will show.

Next, the People will offer their evidence. Evidence usually includes witness testimony and exhibits. After the People present their evidence, the defense may also present evidence but is not required to do so. Because (he/she/they) (is/are) presumed innocent, the defendant[s] (does/do) not have to prove that (he/she/they) (is/are) not guilty.

After you have heard all the evidence and [before] the attorneys (give/have given) their final arguments, I will instruct you on the law that applies to the case.

After you have heard the arguments and instructions, you will go to the jury room to deliberate.

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BENCH NOTES

Instructional Duty

There is no sua sponte duty to give an instruction outlining how the trial will proceed. This instruction has been provided for the convenience of the trial judge who may wish to explain the trial process to jurors.

(New January 2006)

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101. Cautionary Admonitions: Jury Conduct (After Jury Is Selected)

I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. You must not talk about these things with the other jurors either, until the time comes for you to begin your deliberations.

As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not allow anything that happens outside of the courtroom to affect your decision [unless I tell you otherwise]. During the trial, do not read, listen to, or watch any news report or commentary about the case.

Do not do any research on your own or as a group. Do not use a dictionary or other reference materials, investigate the facts or law, conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

When the trial has ended and you have been released as jurors, you may discuss the case with anyone. But under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.

If you receive any information about this case from any source outside of the trial, even unintentionally, do not share that

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information with any other juror. If you do receive such information, or if anyone tries to influence you or any juror, you must immediately tell the bailiff.

Some words or phrases that may be used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in the instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in the instructions are to be applied using their ordinary, everyday meanings.

Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.)

Do not give the sentence that begins "Do not let bias," in the penalty phase of a capital trial.

If there will be a jury view, give the bracketed phrase "unless I tell you otherwise" in the fourth paragraph. (Pen. Code, § 1119.)

AUTHORITY

- Statutory Admonitions. Pen. Code, § 1122.
- Avoid Discussing the Case. *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].

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- Avoid News Reports. *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict. *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice. *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research. *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court's admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his

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> or her view of the evidence in the case, the juror should report that conversation immediately to the court.

(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the second paragraph of this instruction.

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

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102. Note-Taking

You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the jury room during deliberations. Here are some points to consider if you take notes:

1. **Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify;**

AND

2. **You may use your notes only to remind yourself of what happened during the trial, but remember, your notes may be inaccurate or incomplete.**

I do not mean to discourage you from taking notes. I believe you may find it helpful.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on note-taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d 394, 889 P.2d 588].)

AUTHORITY

- Resolving Jurors' Questions. Pen. Code, § 1137.
- Jurors' Use of Notes. *People v. Whitt* (1984) 36 Cal.3d 724, 746 [205 Cal.Rptr. 810, 685 P.2d 1161].

Secondary Sources

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 18.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.05[2] (Matthew Bender).

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103. Reasonable Doubt

I will now explain the presumption of innocence and the People's burden of proof. The defendant[s] (has/have) pleaded not guilty to the charge[s]. The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the presumption of innocence and the state's burden of proof before deliberations. (*People v. Vann* (1974) 12 Cal.3d 220, 225–227 [115 Cal.Rptr. 352, 524 P.2d 824]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463 [114 P.2d 415]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–958 [69 Cal.Rptr.2d 532].) This instruction is included in this section for the convenience of judges who wish to instruct on this point during voir dire or before testimony begins.

If the court will be instructing that the prosecution must prove something by a preponderance of the evidence, give the bracketed phrase "unless I specifically tell you otherwise."

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AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 521, 637, 640.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][i], 85.04[2][a] (Matthew Bender).

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language.

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104. Evidence

You must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is true.

During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses.

The court reporter is making a record of everything said during the trial. If you decide that it is necessary, you may ask that the court reporter's notes be read to you. You must accept the court reporter's notes as accurate.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these principles has been approved. (See *People v.*

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Barajas (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

AUTHORITY

- Evidence Defined. Evid. Code, § 140.
- Arguments Not Evidence. *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence. *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2].
- Striking Testimony. *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence,* §§ 83.01[1], 83.02[2] (Matthew Bender).

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105. Witnesses

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin[, or _____ <*insert any other impermissible bias as appropriate*>]. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- **How well could the witness see, hear, or otherwise perceive the things about which the witness testified?**
- **How well was the witness able to remember and describe what happened?**
- **What was the witness's behavior while testifying?**
- **Did the witness understand the questions and answer them directly?**
- **Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**
- **What was the witness's attitude about the case or about testifying?**
- **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**
- **How reasonable is the testimony when you consider all the other evidence in the case?**
- **[Did other evidence prove or disprove any fact about which the witness testified?]**
- **[Did the witness admit to being untruthful?]**

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- **[What is the witness's character for truthfulness?]**
- **[Has the witness been convicted of a felony?]**
- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**
- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]

[If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.]

[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

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Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

AUTHORITY

- Factors. Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Proof of Character by Negative Evidence. *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].
- Inconsistencies. *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies. *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21]; *People v. Reyes* (1987) 195 Cal.App.3d 957, 965 [240 Cal.Rptr. 752]; *People v. Johnson* (1986) 190 Cal.App.3d 187, 192–194 [237 Cal.Rptr. 479].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 642.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], [c], 85.03[2][b] (Matthew Bender).

(New January 2006)

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106. Jurors Asking Questions

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through the bailiff. I will discuss the question with the attorneys and decide whether it may be asked. Do not feel slighted or disappointed if your question is not asked. Your question may not be asked for a variety of reasons, including the reason that the question may call for an answer that is inadmissible for legal reasons. Also, do not guess the reason your question was not asked or speculate about what the answer might have been. Always remember that you are not advocates for one side or the other in this case. You are impartial judges of the facts.

BENCH NOTES

Instructional Duty

This instruction may be given on request.

AUTHORITY

- Statutory Admonitions. See generally Pen. Code, § 1122.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.02[2] (Matthew Bender).

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B. ADMONITIONS

120. Service Provider for Juror With Disability: Beginning of Trial

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During trial, _____ *<insert name or number of juror>* **will be assisted by (a/an)** _____ *<insert description of service provider, e.g., sign language interpreter>***. The** _____ *<insert description of service provider>* **is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to** _____ *<insert name or number of juror>***.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if a juror will be using the assistance of a service provider. (Code Civ. Proc., § 224(b).)

AUTHORITY

- Juror Not Incompetent Due to Disability. Code Civ. Proc., § 203(a)(6).
- Juror May Use Service Provider. Code Civ. Proc., § 224.
- Court Must Instruct on Use of Service Provider. Code Civ. Proc., § 224(b).

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, §§ 81.02[2], 81.04[4][a] (Matthew Bender).

(New January 2006)

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121. Duty to Abide by Translation Provided in Court

Some testimony may be given in _____ <*insert name or description of language other than English*>. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff).

BENCH NOTES

Instructional Duty

The committee recommends that this instruction be given whenever testimony will be received with the assistance of an interpreter, though no case has held that the court has a sua sponte duty to give the instruction. The instruction may be given at the beginning of the case, when the person requiring translation testifies, or both, at the court's discretion. If a transcript of a tape in a foreign language will be used, the court may modify this instruction. (See Ninth Circuit Manual of Model Jury Instructions, Criminal Cases, Instruction No. 2.8 (2003).) If the court chooses, the instruction may also be modified and given again at the end of the case, with all other instructions. (See Ninth Circuit Manual of Model Jury Instructions, Criminal Cases, Instruction No. 3.20 (2003).)

It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].) "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*Id.* at p. 304.)

AUTHORITY

- Juror May Not Retranslate. *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303–304 [281 Cal.Rptr. 238].

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Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.05[4][a][i] (Matthew Bender).

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122. Corporation Is a Person

(A/The) defendant[s] in this case, _____ <*insert name[s] of corporate defendant[s]*>, (is a corporation/are corporations). Under the law, a corporation must be treated in the same way as a natural person. When I use words like person or he or she in these instructions to refer to the defendant[s], those instructions [also] apply to _____ <*insert name[s] of corporate defendant[s]*>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the defendant is a corporation.

AUTHORITY

- Corporation Is a Person. Pen. Code, § 7.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 3–6.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining*, § 42.21[2][e] (Matthew Bender).

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123. Witness Identified as John or Jane Doe

In this case, a person is called (John/Jane) Doe. This name is used only to protect (his/her) privacy, as required by law. [The fact that the person is identified in this way is not evidence. Do not consider this fact for any purpose.]

BENCH NOTES

Instructional Duty

If an alleged victim will be identified as John or Jane Doe, the court has a **sua sponte** duty to give this instruction at the beginning and at the end of the trial. (Pen. Code, § 293.5(b); *People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9].)

Penal Code section 293.5 provides that the alleged victim of certain offenses may be identified as John or Jane Doe if the court finds it is "reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense." (*Id.*, § 293.5(a).) This applies only to alleged victims of offenses under the following Penal Code sections: 261 (rape), 261.5 (unlawful sexual intercourse), 262 (rape of spouse), 264.1 (aiding and abetting rape), 286 (sodomy), 288 (lewd or lascivious act), 288a (oral copulation), and 289 (penetration by force). Note that the full name must still be provided in discovery. (*Id.*, § 293.5(a); *People v. Bohannon* (2000) 82 Cal.App.4th 798, 803, fn. 7 [98 Cal.Rptr.2d 488]; *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1338 [64 Cal.Rptr.2d 714].)

Give the last two bracketed sentences on request. (*People v. Ramirez, supra*, 55 Cal.App.4th at p. 58.)

AUTHORITY

- Identification as John or Jane Doe. Pen. Code, § 293.5(a).
- Instructional Requirements. Pen. Code, § 293.5(b); *People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9].
- Statute Constitutional. *People v. Ramirez* (1997) 55 Cal.App.4th 47, 54–59 [64 Cal.Rptr.2d 9].

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Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, § 553.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Investigation*, § 70.05 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.24[3] (Matthew Bender).

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124. Separation Admonition

[You may be permitted to separate during recesses and at the end of the day. I will tell you when to return. Please remember, we cannot begin the trial until all of you are in place, so it is important to be on time.]

Remember, do not talk about the case or about any of the people or any subject involved in it with anyone, including the other jurors. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to admonish the jury "at each adjournment of the court before the submission of the cause to the jury."

AUTHORITY

- Statutory Authority. Pen. Code, § 1122(b).

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1] (Matthew Bender).

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A. INTRODUCTORY INSTRUCTION AND ADMONITIONS

200. Duties of Judge and Jury

Members of the jury, I will now instruct you on the law that applies to this case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.]

You must decide what the facts are. It is up to you, exclusively, to decide what happened, based only on the evidence that has been presented to you in this trial.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

You must reach your verdict without any consideration of punishment.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything

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about the facts.] After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jurors are the exclusive judges of the facts and that they are entitled to a copy of the written instructions when they deliberate. (Pen. Code, §§ 1093(f), 1137.) Although there is no sua sponte duty to instruct on the other topics described in this instruction, there is authority approving instruction on these topics.

In the first paragraph, select the appropriate bracketed alternative on written instructions. Penal Code section 1093(f) requires the court to give the jury a written copy of the instructions on request. The committee believes that the better practice is to always provide the jury with written instructions. If the court, in the absence of a jury request, elects not to provide jurors with written instructions, the court must modify the first paragraph to inform the jurors that they may request a written copy of the instructions.

Do not give the sentence that begins "Do not let bias," in the penalty phase of a capital trial.

Do not give the bracketed sentence in the final paragraph if the court will be commenting on the evidence pursuant to Penal Code section 1127.

AUTHORITY

- Copies of Instructions. Pen. Code, §§ 1093(f), 1137.
- Judge Determines Law. Pen. Code, §§ 1124, 1126; *People v. Como* (2002) 95 Cal.App.4th 1088, 1091 [115 Cal.Rptr.2d 922]; see *People v. Williams* (2001) 25 Cal.4th 441, 455 [106 Cal.Rptr.2d 295, 21 P.3d 1209].
- Jury to Decide the Facts. Pen. Code, § 1127.
- Attorney's Comments Are Not Evidence. *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61 [335 P.2d 189].
- Consider All Instructions Together. *People v. Osband* (1996) 13 Cal.4th 622, 679 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Rivers*

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(1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623 [47 Cal.Rptr. 96].

- Do Not Consider Punishment. *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].
- Follow Applicable Instructions. *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice. *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 643, 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.05[1], Ch. 83, *Evidence*, § 83.02, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1], [2][c], 85.03[1], 85.05[2], [4] (Matthew Bender).

RELATED ISSUES

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

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201. Do Not Investigate

Do not do any research on your own or as a group. Do not use a dictionary or other reference materials, investigate the facts or law, conduct any experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.)

AUTHORITY

- No Independent Research. Pen. Code, § 1122; *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[4][a][i] (Matthew Bender).

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202. Note-Taking

You have been given notebooks and may have taken notes during the trial. Please do not remove your notes from the jury room. You may use your notes during deliberations only to remind yourself of what happened during the trial. But remember, your notes may be inaccurate or incomplete. If there is a disagreement about what actually happened at trial, you may ask the court reporter to read back the relevant parts of the testimony to assist you. It is the testimony that must guide your deliberations, not your notes.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on note-taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d 394, 889 P.2d 588].)

AUTHORITY

- Jurors' Use of Notes. *People v. Whitt* (1984) 36 Cal.3d 724, 746 [205 Cal.Rptr. 810, 685 P.2d 1161].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

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203. Multiple Defendants

<Alternative A—different charges for different defendants>

[Because more than one defendant is on trial here, I am going to remind you which individuals are charged with which crimes.

_____ is charged with _____.

_____ is charged with _____.]

<Alternative B—charges the same for all defendants>

[(Both/All) defendants in this case are charged with the same crimes.]

You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately. If you cannot reach a verdict on (all/both) of the defendants, or on any of the charges against any defendant, you must report your disagreement to the court and you must return your verdict on any defendant or charge on which you have unanimously agreed.

Unless I tell you otherwise, all instructions apply to each defendant.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if multiple defendants are on trial. (*People v. Mask* (1986) 188 Cal.App.3d 450, 457 [233 Cal.Rptr. 181]; *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879].)

Give alternative A if any of the charges against the defendants are different. Give alternative B if all of the charges against all defendants are the same.

AUTHORITY

- Separate Verdicts When Multiple Defendants. Pen. Code, §§ 970, 1160.

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- Instructional Duty. *People v. Mask* (1986) 188 Cal.App.3d 450, 457 [233 Cal.Rptr. 181]; *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, § 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][ii] (Matthew Bender).

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204. Defendant Physically Restrained

The fact that physical restraints have been placed on [the] defendant[s] [_____ <*insert name[s] of defendant[s] if multiple defendants in case but not all are restrained*>] is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if a defendant has been restrained in a manner that is visible to the jury. (*People v. Duran* (1976) 16 Cal.3d 282, 291–292 [127 Cal.Rptr. 618, 545 P.2d 1322].) If the restraints are not visible, **do not** give this instruction unless requested by the defense.

The court must find a "manifest need for such restraints" and the record must clearly disclose the reasons the restraints were used. (*People v. Duran, supra*, 16 Cal.3d at pp. 290–291.) "The imposition of physical restraints in the absence of a record showing . . . violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Id.* at p. 291.) The court must make the determination based on facts, not rumor, and may not delegate the decision to law enforcement personnel. (*People v. Mar* (2002) 28 Cal.4th 1201, 1218 [124 Cal.Rptr.2d 161, 52 P.3d 95].) The reasons supporting physical restraints must relate to the individual defendant. The court cannot rely on the nature of the charges, the courtroom design, or the lack of sufficient staff. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213 [120 Cal.Rptr.2d 477, 47 P.3d 262]; *People v. Cunningham* (2001) 25 Cal.4th 926, 986–987 [108 Cal.Rptr.2d 291, 25 P.3d 519]; *People v. Seaton* (2001) 26 Cal.4th 598, 652 [110 Cal.Rptr.2d 441, 28 P.3d 175].)

The use of stun belts is subject to the same requirements. (*People v. Mar, supra*, 28 Cal.4th at pp. 1205–1206.) In addition, the Supreme Court has urged "great caution" in using stun belts at all, stating that, prior to using such devices, courts must consider the psychological impact, risk of

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accidental activation, physical dangers, and limited ability to control the level of shock delivered. (*Ibid.*)

AUTHORITY

- Instructional Duty. *People v. Duran* (1976) 16 Cal.3d 282, 291–292 [127 Cal.Rptr. 618, 545 P.2d 1322].
- Requirements Before Use. *People v. Duran* (1976) 16 Cal.3d 282, 290–292 [127 Cal.Rptr. 618, 545 P.2d 1322]; *People v. Mar* (2002) 28 Cal.4th 1201, 1218 [124 Cal.Rptr.2d 161, 52 P.3d 95].
- Use of Stun Belts. *People v. Mar* (2002) 28 Cal.4th 1201, 1205–1206 [124 Cal.Rptr.2d 161, 52 P.3d 95].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, §§ 11–16.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.09[6][b], [c], [d] (Matthew Bender).

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205. Charge Removed From Jury Consideration

Count[s] ____ charging the defendant with _____ <*insert name[s] of offense[s]*> no longer need[s] to be decided in this case.

Do not speculate about or consider in any way why you no longer need to decide (this/these) count[s].

BENCH NOTES

Instructional Duty

The court may give this instruction if one or more of the original counts has been removed from the case, whether through plea or dismissal.

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206. One or More Defendants Removed From Case

The charge[s] against defendant[s] _____ <*insert names[s] of defendant[s]*> no longer need[s] to be decided in this case.

Do not speculate about or consider in any way why the charge[s] against defendant[s] _____ <*insert names[s] of defendant[s]*> (do/does) not need to be decided.

BENCH NOTES

Instructional Duty

The court may give this instruction if one or more of the original defendants has been removed from the case, whether through plea, dismissal, or flight.

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207. Proof Need Not Show Actual Date

It is alleged that the crime occurred on [or about] _____ <*insert alleged date*>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. This instruction should not be given: (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity; and (2) when two similar offenses are charged in separate counts. (*People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705], overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 [263 Cal.Rptr. 513, 781 P.2d 547]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 955; *People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].

Secondary Sources

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[2] (Matthew Bender).

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

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B. GENERAL LEGAL CONCEPTS

220. Reasonable Doubt

The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the presumption of innocence and the state's burden of proof. (*People v. Vann* (1974) 12 Cal.3d 220, 225–227 [115 Cal.Rptr. 352, 524 P.2d 824]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463 [114 P.2d 415]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–958 [69 Cal.Rptr.2d 532].)

If the court will be instructing that the prosecution has a different burden of proof, give the bracketed phrase "unless I specifically tell you otherwise."

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AUTHORITY

- Instructional Requirements. Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 521, 637, 640.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], [2][a][i], 85.04[2][a] (Matthew Bender).

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61, 63 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language. For an alternate view of instructing on reasonable doubt, see Committee on Standard Jury Instructions—Criminal, Minority Report to CALJIC "Reasonable Doubt" Report, in Alternative Definitions of Reasonable Doubt: A Report to the California Legislature (May 22, 1987; repr., San Francisco: Daily Journal, 1987) pp. 51–53.

RELATED ISSUES

Pinpoint Instruction on Reasonable Doubt

A defendant is entitled, on request, to a nonargumentative instruction that directs attention to the defense's theory of the case and relates it to the state's burden of proof. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [84 Cal.Rptr. 711, 465 P.2d 847] [error to deny requested instruction relating

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defense evidence to the element of premeditation and deliberation].) Such an instruction is sometimes called a pinpoint instruction. "What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the specific evidence on which the theory of the defense 'focuses' which is related to reasonable doubt." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338 [185 Cal.Rptr. 506] [court erred in refusing to give requested instruction relating self-defense to burden of proof]; see also *People v. Granados* (1957) 49 Cal.2d 490, 496 [319 P.2d 346] [error to refuse instruction relating reasonable doubt to commission of felony in felony-murder case]; *People v. Brown* (1984) 152 Cal.App.3d 674, 677–678 [199 Cal.Rptr. 680] [error to refuse instruction relating reasonable doubt to identification].)

(Revised August 2006)

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221. Reasonable Doubt: Bifurcated Trial

The People are required to prove the allegations beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the allegation is true. The evidence does not need to eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved (an/the) allegation beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received during this [phase of the] trial. Unless the evidence proves (an/the) allegation beyond a reasonable doubt, you must find that the allegation has not been proved [and disregard it completely].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on reasonable doubt in any proceeding in which that standard of proof applies.

This instruction is provided for the court to use **only** in bifurcated trials or special proceedings where the court is required to instruct on reasonable doubt but CALCRIM No. 220, *Reasonable Doubt*, would not be appropriate as written. **Do not** use this instruction in place of CALCRIM No. 220 in a trial on the substantive crimes charged.

This instruction should be used **only** in the following situations:

1. When the court has granted a bifurcated trial on a prior conviction or a sentencing factor (see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial* and CALCRIM No. 3251, *Enhancement, Sentencing Factor, or Specific Factual Issue: Template—Bifurcated Trial*);
2. When the court is conducting a trial on a petition to commit someone as a sexually violent predator or for an extension of commitment (see CALCRIM No. 3453, *Extension of Commitment* and CALCRIM No. 3454, *Commitment as Sexually Violent Predator*); or

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3. In the penalty phase of a capital trial when the court is instructing on other violent criminal activity or prior felony convictions offered as aggravation (see CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* and CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes*).

In the first sentence, the court, at its discretion, may wish to insert a description of the specific allegations that the People must prove.

In the final paragraph, give the bracketed phrase "and disregard it completely" when using this instruction in the penalty phase of a capital trial.

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384] [regarding lack of need to instruct on presumption of innocence for mentally disordered offenders in non-criminal proceedings].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, § 85.02[1A][a], [2][a][i] (Matthew Bender).

(New January 2006)

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222. Evidence

You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

The court reporter has made a record of everything that was said during the trial. If you decide that it is necessary, you may ask that the court reporter's notes be read to you. You must accept the court reporter's notes as accurate.

[During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts. Because there is no dispute about those facts you must accept them as true.]

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BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

If the parties stipulated to one or more facts, give the bracketed paragraph that begins with "During the trial, you were told."

AUTHORITY

- Evidence Defined. Evid. Code, § 140.
- Arguments Not Evidence. *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence. *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400].
- Stipulations. *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].
- Striking Testimony. *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 636, 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

RELATED ISSUES

Non-Testifying Courtroom Conduct

There is authority for an instruction informing the jury to disregard defendant's in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [206 Cal.Rptr. 468] [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) However, if the defendant has put his or her character in issue or another basis for relevance exists, such an instruction

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should not be given. (*People v. Garcia, supra*, at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [246 Cal.Rptr. 855].)

(New January 2006)

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223. Direct and Circumstantial Evidence: Defined

Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction explaining direct and circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].) The court must give this instruction if the court will be giving either CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence* or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*.

The court, at its discretion, may give this instruction in any case in which circumstantial evidence has been presented.

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AUTHORITY

- Direct Evidence Defined. Evid. Code, § 410.
- Inference Defined. Evid. Code, § 600(b).
- Difference Between Direct and Circumstantial Evidence. *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 3.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

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224. Circumstantial Evidence: Sufficiency of Evidence

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].)

There is no sua sponte duty to give this instruction when the circumstantial evidence is incidental to and corroborative of direct evidence. (*People v. Malbrough* (1961) 55 Cal.2d 249, 250–251 [10 Cal.Rptr. 632, 359 P.2d 30]; *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243]; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270–1271 [46 Cal.Rptr.2d 388].) This is so even when the corroborative circumstantial evidence is essential to the prosecution's case, e.g., when corroboration of an accomplice's testimony is required under Penal Code section 1111. (*People v. Williams* (1984) 162 Cal.App.3d 869, 874 [208 Cal.Rptr. 790].)

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If intent is the only element proved by circumstantial evidence, do not give this instruction. Give CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. (*People v. Marshall* (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280].)

AUTHORITY

- Direct Evidence Defined. Evid. Code, § 410.
- Inference Defined. Evid. Code, § 600(b).
- Between Two Reasonable Interpretations of Circumstantial Evidence, Accept the One That Points to Innocence. *People v. Merkouris* (1956) 46 Cal.2d 540, 560–562 [297 P.2d 999] [error to refuse requested instruction on this point]; *People v. Johnson* (1958) 163 Cal.App.2d 58, 62 [328 P.2d 809] [sua sponte duty to instruct]; see *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [46 Cal.Rptr.2d 645].
- Circumstantial Evidence Must Be Entirely Consistent With a Theory of Guilt and Inconsistent With Any Other Rational Conclusion. *People v. Bender* (1945) 27 Cal.2d 164, 175 [163 P.2d 8] [sua sponte duty to instruct]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [same].
- Difference Between Direct and Circumstantial Evidence. *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].
- Each Fact in Chain of Circumstantial Evidence Must Be Proved. *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243] [error to refuse requested instruction on this point].
- Sua Sponte Duty When Prosecutor's Case Rests Substantially on Circumstantial Evidence. *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 3.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

RELATED ISSUES

Extrajudicial Admissions

Extrajudicial admissions are not the type of indirect evidence requiring instruction on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–175 [133 Cal.Rptr. 135, 554 P.2d 881].)

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225. Circumstantial Evidence: Intent or Mental State

The People must prove not only that the defendant did the acts charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instructions for each crime explain the (intent/ [and/or] mental state) required.

A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish the element of a specific intent or a mental state. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1].)

Give this instruction when the defendant's intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial

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evidence. If other elements of the offense also rest substantially or entirely on circumstantial evidence, do not give this instruction. Give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *People v. Hughes* (2002) 27 Cal.4th 287, 347 [116 Cal.Rptr.2d 401, 39 P.3d 432].)

If the court is also instructing on a strict-liability offense, the court may wish to modify this instruction to clarify the charges to which it applies.

AUTHORITY

- Instructional Requirements. *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 481–482 [268 Cal.Rptr. 262] [when both specific intent and mental state are elements].
- Intent Manifested by Circumstances. Pen. Code, § 21(a).
- Accept Reasonable Interpretation of Circumstantial Evidence That Points Against Specific Intent. *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254 [302 P.2d 406], disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86].
- Circumstantial Evidence Must Be Entirely Consistent With Existence of Specific Intent. *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254 [302 P.2d 406], disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86].
- Reject Unreasonable Interpretations. *People v. Hines* (1997) 15 Cal.4th 997, 1049–1050 [64 Cal.Rptr.2d 594, 938 P.2d 388].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 3, 6.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

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RELATED ISSUES

General or Specific Intent Explained

A crime is a general-intent offense when the statutory definition of the crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence. A crime is a specific-intent offense when the statutory definition refers to the defendant's intent to do some further act or achieve some additional consequence. (*People v. McDaniel* (1979) 24 Cal.3d 661, 669 [156 Cal.Rptr. 865, 597 P.2d 124]; *People v. Hood* (1969) 1 Cal.3d 444, 456–457 [82 Cal.Rptr. 618, 462 P.2d 370]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768]; see, e.g., *People v. Whitfield* (1994) 7 Cal.4th 437, 449–450 [27 Cal.Rptr.2d 858, 868 P.2d 272] [second degree murder based on implied malice is a specific-intent crime].)

Only One Possible Inference

The fact that elements of a charged offense include mental elements that must necessarily be proved by inferences drawn from circumstantial evidence does not alone require an instruction on the effect to be given to such evidence. (*People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629]; *People v. Wiley* (1976) 18 Cal.3d 162, 174–176 [133 Cal.Rptr. 135, 554 P.2d 881].) When the only inference to be drawn from circumstantial evidence points to the existence of a required specific intent or mental state, a circumstantial evidence instruction need not be given sua sponte, but should be given on request. (*People v. Gordon* (1982) 136 Cal.App.3d 519, 531 [186 Cal.Rptr. 373]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 793–794 [155 Cal.Rptr. 152].)

Direct Evidence, Extrajudicial Admission, or No Substantial Reliance

This instruction should not be given if direct evidence of the mental elements exists (*People v. Wiley* (1976) 18 Cal.3d 162, 175 [133 Cal.Rptr. 135, 554 P.2d 881]), if the only circumstantial evidence is an extrajudicial admission (*People v. Gould* (1960) 54 Cal.2d 621, 629 [7 Cal.Rptr. 273, 354 P.2d 865], overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 271–272 [48 Cal.Rptr.2d 135, 906 P.2d 1290]), or if the prosecution does not substantially rely on circumstantial evidence (*People v. DeLeon* (1982) 138 Cal.App.3d 602, 607–608 [188 Cal.Rptr. 63]).

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See the Related Issues section of CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*.

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226. Witnesses

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin[, or _____ <*insert any other impermissible bias as appropriate*>]. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- **How well could the witness see, hear, or otherwise perceive the things about which the witness testified?**
- **How well was the witness able to remember and describe what happened?**
- **What was the witness's behavior while testifying?**
- **Did the witness understand the questions and answer them directly?**
- **Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**
- **What was the witness's attitude about the case or about testifying?**
- **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**
- **How reasonable is the testimony when you consider all the other evidence in the case?**
- **[Did other evidence prove or disprove any fact about which the witness testified?]**
- **[Did the witness admit to being untruthful?]**

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- **[What is the witness's character for truthfulness?]**
- **[Has the witness been convicted of a felony?]**
- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**
- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]

[If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.]

[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

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Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

If the court instructs on a prior felony conviction or prior misconduct admitted pursuant to *People v. Wheeler* (1992) 4 Cal.4th 284 [14 Cal.Rptr.2d 418, 841 P.2d 938], the court should consider whether to give CALCRIM No. 316, *Additional Instructions on Witness Credibility—Other Conduct*. (See Bench Notes to that instruction.)

AUTHORITY

- Factors. Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Inconsistencies. *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies. *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].
- Proof of Character by Negative Evidence. *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 642.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][b], [2][b], [c], 85.03[2][b] (Matthew Bender).

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C. CAUSATION

240. Causation

An act causes (injury/_____ <*insert other description*>) if the (injury/_____ <*insert other description*>) is the direct, natural, and probable consequence of the act and the (injury/_____ <*insert other description*>) would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

<*Give if multiple potential causes.*>

[There may be more than one cause of (injury/_____ <*insert other description*>). An act causes (injury/_____ <*insert other description*>), only if it is a substantial factor in causing the (injury/_____ <*insert other description*>). A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the (injury/_____ <*insert other description*>).]

BENCH NOTES

Instructional Duty

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) The committee has addressed causation in those instructions where the issue is most likely to arise. If the particular facts of the case raise a causation issue and other instructions do not adequately cover the point, give this instruction.

If there is evidence of multiple potential causes, the court should also give the bracketed paragraph. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

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AUTHORITY

- Proximate Cause. *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225]; *People v. Roberts* (1992) 2 Cal.4th 271, 315–322 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Substantial Factor. *People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].
- Independent Intervening Cause. *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Causation Instructions. *People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Roberts* (1992) 2 Cal.4th 271, 311–322 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].
- Instructional Duty. *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].
- Natural and Probable Consequences Defined. See *People v. Prettyman* (1996) 14 Cal.4th 248, 291 [58 Cal.Rptr.2d 827, 926 P.2d 1013] (conc. & dis. opn. of Brown, J.).

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 35–44.

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 93.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[1A][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

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D. UNION OF ACT AND INTENT

250. Union of Act and Intent: General Intent

Every crime [or other allegation] charged in this case requires proof of the union, or joint operation, of act and wrongful intent [except for the crime[s] charged in Count[s] ____].

In order to be guilty of the crime[s] of _____ <*insert name[s] of alleged offense[s]*> **[or the allegation[s] of _____** <*insert name[s] of enhancement[s]*>**], a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally or on purpose. The act required is explained in the instructions for each crime [or allegation]. However, it is not required that he or she intend to break the law.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and general criminal intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) However, this instruction **must not** be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses require only a general criminal intent by inserting the names of the offenses where indicated in the second paragraph of the instruction. (*People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific

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intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt, supra*, 222 Cal.App.2d at pp. 586–587.)

If the defendant is also charged with a criminal negligence or strict liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

"A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86] [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a **sua sponte** duty to give the appropriate defense instructions. (See Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–5.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [2] (Matthew Bender).

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

The offense of failure to register as a sex offender requires proof that the defendant actually knew of his or her duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].) For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rtpr.3d 260]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) In such cases, the court should give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, instead of this instruction.

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251. Union of Act and Intent: Specific Intent or Mental State

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Every crime [or other allegation] charged in this case requires proof of the union, or joint operation, of act and wrongful intent [except for the crime[s] charged in Count[s] ____].

In order to be guilty of the crime[s] of _____ <*insert name[s] of alleged offense[s]*> [or the allegation[s] of _____ <*insert name[s] of enhancement[s]*>], a person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the (intent/ [and/or] mental state) required are explained in the instruction for every crime [or allegation].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) This instruction **must** be given if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense.

Do not give this instruction if the case involves only general-intent offenses that do not require any specific mental state. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*.) If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses are specific-intent offenses by inserting the names of the offenses where indicated in the second paragraph of the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210];

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People v. Bernhardt (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

This instruction does not apply to criminal negligence or strict liability. If the defendant is also charged with a criminal negligence or strict liability offense, the court should give the appropriate Union of Act and Intent instruction: CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Turner* (1971) 22 Cal.App.3d 174, 184 [99 Cal.Rptr. 186]; *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–6.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [3] (Matthew Bender).

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252. Union of Act and Intent: General and Specific Intent Together

Every crime [or other allegation] charged in this case requires proof of the union, or joint operation, of act and wrongful intent [except for the crime[s] charged in Count[s] ____].

The following crime[s] [and allegation[s]] require[s] general criminal intent: _____ <*insert name[s] of alleged offense[s] and enhancement[s]*>. To be guilty of (this/these) offense[s], a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally or on purpose. It is not required, however, that the person intend to break the law. The act required is explained in the instruction for each crime [or allegation].

The following crime[s] [and allegation[s]] require[s] a specific intent or mental state: _____ <*insert name[s] of alleged offense[s] and enhancement[s]*>. To be guilty of (this/these) offense[s], a person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific intent or mental state. The act and the intent or mental state required are explained in the instruction for each crime [or allegation].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the joint union of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) The court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.

Do not give this instruction if the case involves only offenses requiring a specific intent or mental state or involves only offenses that do not. (See

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CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.)

The court should specify for the jury which offenses require general criminal intent and which require a specific intent or mental state by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

If the defendant is also charged with a criminal negligence or strict-liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d

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772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].

- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1]–[3] (Matthew Bender).

RELATED ISSUES

See the Bench Notes and Related Issues sections of CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

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253. Union of Act and Intent: Criminal Negligence

In order to be guilty of the crime[s] of _____ <*insert name[s] of alleged offense[s]*> [or the allegation[s] of _____ <*insert name[s] of enhancement[s]*>], a person must do an act [or fail to do an act] with (criminal/gross) negligence. (Criminal/Gross) negligence is defined in the instructions on that crime.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on an offense for which criminal or gross negligence is an element. **Do not** give this instruction if only general or specific-intent offenses are presented to the jury. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110 [51 Cal.Rptr.2d 402].) Although no case has held that the court has a sua sponte duty to give this instruction, the committee recommends that the instruction be given, if applicable, as a matter of caution.

The court must specify for the jury which offenses require criminal negligence by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

The court should select either "criminal" or "gross" based on the words used in the instruction on the elements of the underlying offense.

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Criminal or Gross Negligence Defined. *People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 20.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [4] (Matthew Bender).

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254. Union of Act and Intent: Strict-Liability Crime

In order to be guilty of the crime[s] of _____ <*insert name[s] of alleged offense[s]*> [or the allegation[s] of _____ <*insert name[s] of enhancement[s]*>], a person only needs to do the prohibited act [or to fail to do the required act]. The People do not need to prove any intent or other mental state.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on a strict-liability offense. The committee does not believe that the instruction is required. However, the instruction may be useful when the case also involves general-intent, specific-intent, or criminal negligence offenses. **Do not** give this instruction unless the court is completely certain that the offense is a strict-liability offense. For a discussion of the rarity of strict-liability offenses in modern criminal law, see *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590], and *People v. Simon* (1995) 9 Cal.4th 493, 519–522 [37 Cal.Rptr.2d 278, 886 P.2d 1271].

The court must specify for the jury which offenses are strict-liability offenses by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

AUTHORITY

- Strict-Liability Offenses Discussed. *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590]; *People v. Simon* (1995) 9 Cal.4th 493, 519–522 [37 Cal.Rptr.2d 278, 886 P.2d 1271].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 17–19.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[5] (Matthew Bender).

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EVIDENCE

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300. All Available Evidence
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302. Evaluating Conflicting Evidence
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(ii) Particular Types of Witnesses

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335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice
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356. *Miranda*-Defective Statements
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359. Corpus Delicti: Independent Evidence of a Charged Crime
360. Statements to an Expert
361. Failure to Explain or Deny Adverse Testimony
362. Consciousness of Guilt: False Statements
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E. PARTICULAR TYPES OF EVIDENCE

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371. Consciousness of Guilt: Suppression and Fabrication of Evidence
372. Defendant's Flight
373. Other Perpetrator
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375. Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
376. Possession of Recently Stolen Property as Evidence of a Crime
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A. GENERAL INSTRUCTIONS

300. All Available Evidence

Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.

BENCH NOTES

Instructional Duty

The court is not required to give this instruction sua sponte; however, it should be given on request. (See generally Pen. Code, §§ 1093(f), 1127; *People v. Pitts* (1990) 223 Cal.App.3d 606, 880, 881 [273 Cal.Rptr. 757].)

AUTHORITY

- Instructional Requirements. *People v. Simms* (1970) 10 Cal.App.3d 299, 313 [89 Cal.Rptr. 1].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, Ch. 83, *Evidence* (Matthew Bender).

RELATED ISSUES

Willful Suppression of or Failure to Obtain Evidence

Willful suppression of evidence by the government constitutes a denial of a fair trial and of due process. (*People v. Noisey* (1968) 265 Cal.App.2d 543, 549–550 [71 Cal.Rptr. 339].) Likewise, willful failure by investigating officers to obtain evidence that would clear a defendant would amount to a denial of due process of law. (*Ibid.*) However, failure to look for evidence is different from suppressing known evidence and "the mere fact that investigating officers did not pursue every possible means of investigation of crime does not, standing alone, constitute denial of due process or suppression of evidence." (*Ibid.*; see also *People v. Tuthill* (1947) 31 Cal.2d 92, 97–98 [187 P.2d 16], overruled on other grounds as noted by

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People v. Balderas (1985) 41 Cal.3d 144, 182 [222 Cal.Rptr. 184, 711 P.2d 480] ["[t]here is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial."].)

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301. Single Witness's Testimony

[Except for the testimony of _____ <*insert witness's name*>, which requires supporting evidence,] (the/The) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].) Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration. (*People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].)

The following constitutional provisions and statutes require evidence that corroborates a witness's testimony: Cal. Const., art. I, § 20 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 653f [solicitation of a felony]; 118 [perjury]; 1108 [abortion and seduction of a minor]; 532 [obtaining property by false pretenses].

AUTHORITY

- Instructional Requirements. Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119, 538 P.2d 247].
- Corroboration Required. *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 111.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

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RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases

In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

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302. Evaluating Conflicting Evidence

If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of the greater number of witnesses, or any witness, without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on weighing contradictory evidence unless corroborating evidence is required. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884 [123 Cal.Rptr. 119, 538 P.2d 247].)

AUTHORITY

- Instructional Requirements. *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884 [123 Cal.Rptr. 119, 538 P.2d 247].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 649.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

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303. Limited Purpose Evidence in General

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an admonition limiting consideration of evidence; however, it must be given on request. (Evid. Code, § 355; *People v. Simms* (1970) 10 Cal.App.3d 299, 311 [89 Cal.Rptr. 1].)

AUTHORITY

- Instructional Requirements. Evid. Code, § 355; *People v. Simms* (1970) 10 Cal.App.3d 299, 311 [89 Cal.Rptr. 1].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30, 31, 35.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.04[3], Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][b] (Matthew Bender).

RELATED ISSUES

Timing of Instruction

The court has discretion to give limiting instructions at the time the evidence is admitted or at the close of evidence. (*People v. Dennis* (1998) 17 Cal.4th 468, 533–534 [71 Cal.Rptr.2d 680, 950 P.2d 1035] [giving limiting instruction regarding use of defendant's statements to psychiatrist at close of all evidence did not result in error].)

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304. Multiple Defendants: Limited Admissibility of Evidence

I instructed you during the trial that certain evidence was admitted only against [a] certain defendant[s]. You must not consider that evidence against any other defendant.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction limiting evidence to one defendant; however, it must be given on request. (Evid. Code, § 355; *People v. Miranda* (1987) 44 Cal.3d 57, 83 [241 Cal.Rptr. 594, 744 P.2d 1127], disapproved of on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907 [269 Cal.Rptr. 269, 790 P.2d 676].)

AUTHORITY

- Instructional Requirements. Evid. Code, § 355.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30, 31, 35.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.04[3] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 303, *Limited Purpose Evidence in General*.

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305. Multiple Defendants: Limited Admissibility of Defendant's Statement

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You have heard evidence that defendant _____ <*insert defendant's name*> made a statement (out of court/before trial). You may consider that evidence only against (him/her), not against any other defendant.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's statements; however, it must be given on request. (Evid. Code, § 355; *People v. Simms* (1970) 10 Cal.App.3d 299, 311 [89 Cal.Rptr. 1].)

If the defendant made the statement out of court, give that phrase in the parenthetical. If the statement was made in a previous proceeding, give the phrase "before trial." (See *People v. Perry* (1972) 7 Cal.3d 756, 787–788 [103 Cal.Rptr. 161, 499 P.2d 129].)

AUTHORITY

- Instructional Requirements. Evid. Code, § 355.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30, 31, 35.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][b] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 303, *Limited Purpose Evidence in General*.

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306. Untimely Disclosure of Evidence

Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.

An attorney for the (People/defense) failed to disclose: _____ <*describe evidence that was not disclosed*> [within the legal time period].

In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

[However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]

<*Consider for multiple defendant cases*>

[You must not consider the fact that an attorney for defendant _____ <*insert defendant's name*> failed to disclose evidence when you decide the charges against defendant[s] _____ <*insert names of other defendant[s]*>.]

BENCH NOTES

Instructional Duty

While the court has discretion to give an instruction on untimely disclosure of evidence (Pen. Code, § 1054.5(b)), in view of criticism of similar instructions (see *People v. Bell* (2004) 118 Cal.App.4th 249, 254–257 [12 Cal.Rptr.3d 808]; *People v. Cabral* (2004) 121 Cal.App.4th 748, 752–753 [17 Cal.Rptr.3d 456]; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942–943 [17 Cal.Rptr.3d 692]), the court should consider whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant.

This instruction addresses a failure to comply with Penal Code requirements. If the court imposes additional sanctions, it may choose to

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instruct the jury accordingly. (See *People v. Zamora* (1980) 28 Cal.3d 88, 103 [167 Cal.Rptr. 573, 615 P.2d 1361]; *People v. Edwards* (1993) 17 Cal.App.4th 1248, 1265 [22 Cal.Rptr.2d 3].) A court may make any order necessary to enforce the disclosure provisions, including, but not limited to, orders for immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. (Pen. Code, § 1054.5(b).)

If the court concludes that one defendant in a multidefendant case failed to comply with the statute, the last bracketed paragraph should be given.

AUTHORITY

- Instructional Requirements. Pen. Code, § 1054.5(b); *People v. Bell* (2004) 118 Cal.App.4th 249, 254–257 [12 Cal.Rptr.3d 808]; *People v. Cabral* (2004) 121 Cal.App.4th 748, 752–753 [17 Cal.Rptr.3d 456]; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942–943 [17 Cal.Rptr.3d 692].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 79 et seq.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Investigation*, § 70.09[1] (Matthew Bender).

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B. WITNESSES

(i) Regarding Specific Testimony

315. Eyewitness Identification

You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.

In evaluating identification testimony, consider the following questions:

- **Did the witness know or have contact with the defendant before the event?**
- **How well could the witness see the perpetrator?**
- **What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[, and _____ <*insert any other relevant circumstances*>]?**
- **How closely was the witness paying attention?**
- **Was the witness under stress when he or she made the observation?**
- **Did the witness give a description and how does that description compare to the defendant?**
- **How much time passed between the event and the time when the witness identified the defendant?**
- **Was the witness asked to pick the perpetrator out of a group?**
- **Did the witness ever fail to identify the defendant?**
- **Did the witness ever change his or her mind about the identification?**
- **How certain was the witness when he or she made an identification?**
- **Are the witness and the defendant of different races?**

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- **Were there any other circumstances affecting the witness's ability to make an accurate identification?**
- **[Was the witness able to identify other participants in the crime?]**
- **[Was the witness able to identify the defendant in a photographic or physical lineup?]**
- **[**_____ <*insert other relevant factors raised by the evidence*>**.]**

The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant not guilty.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on eyewitness testimony. (*People v. Richardson* (1978) 83 Cal.App.3d 853, 863 [148 Cal.Rptr. 120], disapproved on other grounds by *People v. Saddler* (1979) 24 Cal.3d 671, 682 [156 Cal.Rptr. 871, 597 P.2d 130].) An instruction relating eyewitness identification to reasonable doubt, including any relevant "pinpoint" factors, must be given by the trial court on request "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." (*People v. Wright* (1988) 45 Cal.3d 1126, 1143–1144 [248 Cal.Rptr. 600, 755 P.2d 1049], quoting *People v. McDonald* (1984) 37 Cal.3d 351, 377 [208 Cal.Rptr. 236, 690 P.2d 709], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 [98 Cal.Rptr.2d 431, 4 P.3d 265]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [31 Cal.Rptr.2d 321, 875 P.2d 36]; *People v. Palmer* (1984) 154 Cal.App.3d 79, 89 [203 Cal.Rptr. 474] [error to refuse defendant's requested instruction on eyewitness testimony].)

AUTHORITY

- Factors. *People v. Wright* (1988) 45 Cal.3d 1126, 1139, fn. 9, 1141 [248 Cal.Rptr. 600, 755 P.2d 1049]; *People v. West* (1983) 139 Cal.App.3d 606, 609 [189 Cal.Rptr. 36].

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- Reasonable Doubt. *People v. Hall* (1980) 28 Cal.3d 143, 159–160 [167 Cal.Rptr. 844, 616 P.2d 826], overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422, fn. 6 [87 Cal.Rptr.2d 474, 981 P.2d 98].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 640.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 31, *Eyewitness Identification*, §§ 31.01–31.07 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

COMMENTARY

The court should give the unbracketed factors, if requested, in every case in which identity is disputed. The bracketed factors should be given if requested and factually appropriate. A blank space has also been provided for the court to include any factual circumstances relevant to eyewitness identification that have not been addressed in the preceding list of factors.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1139 [248 Cal.Rptr. 600, 755 P.2d 1049], the court suggested that the trial court select factors from an approved list of eyewitness identification factors and then give counsel the opportunity to supplement with any additional relevant factors. (*Id.* at pp. 1126, 1143.) Additional "pinpoint" factors should be neutrally written, brief, and nonargumentative. (*Ibid.*; see also *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302–1303 [32 Cal.Rptr.2d 169], overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 908 P.2d 1037].)

RELATED ISSUES

Unreliability of Eyewitness Identification

An instruction to view eyewitness testimony with caution and that "mistaken identification is not uncommon" should not be given because it improperly singles out this testimony as suspect. (*People v. Wright* (1988) 45 Cal.3d 1126, 1153 [248 Cal.Rptr. 600, 755 P.2d 1049] [special cautionary instruction unnecessary as duplicative of required eyewitness "factors" instruction]; see also *People v. Benson* (1990) 52 Cal.3d 754,

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805, fn. 12 [276 Cal.Rptr. 827, 802 P.2d 330].) If a defendant wants to present information on the unreliability of eyewitness identifications under a particular set of circumstances, he or she must use means other than a jury instruction, such as expert testimony. (*People v. Wright, supra,* 45 Cal.3d at pp. 1153–1154.)

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316. Additional Instructions on Witness Credibility-Other Conduct

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<Alternative A—felony conviction>

[If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

<Alternative B—prior criminal conduct with or without conviction>

[If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction; however, the instruction must be given on request. (*People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [260 Cal.Rptr. 27]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080] [overruling *People v. Mayfield* (1972) 23 Cal.App.3d 236 [100 Cal.Rptr. 104], which had found a sua sponte duty to give limiting instruction on felony conviction admitted for impeachment].)

If a felony conviction or other misconduct has been admitted only on the issue of credibility, give the bracketed word "only."

Do not give this instruction if a conviction also has been admitted to prove an element of a charged offense. (*People v. Dewberry* (1959) 51 Cal.2d 548, 553–554 [334 P.2d 852].)

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It is unclear whether this instruction is appropriate if the evidence also has been admitted for a purpose other than to prove an element of the offense (as discussed above). For example, the evidence may have been admitted under Evidence Code section 1108. In such cases, if the court does give this instruction, the court may omit the bracketed "only."

AUTHORITY

- Limiting Instruction Must Be Given on Request. *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [260 Cal.Rptr. 27]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].
- Felony Conviction Admissible for Impeachment. Evid. Code, § 788.
- Standard for Admitting Felony Conviction. *People v. Castro* (1985) 38 Cal.3d 301, 306–319 [211 Cal.Rptr. 719, 696 P.2d 111]; *People v. Beagle* (1972) 6 Cal.3d 441, 451–452 [99 Cal.Rptr. 313, 492 P.2d 1].
- Misdemeanor Conduct Admissible for Impeachment. *People v. Wheeler* (1992) 4 Cal.4th 284, 295–296 [14 Cal.Rptr.2d 418, 841 P.2d 938].
- Record Must Demonstrate Court Conducted Evid. Code, § 352 Weighing. *People v. Navarez* (1985) 169 Cal.App.3d 936, 950 [215 Cal.Rptr. 519].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 292–314.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][e], Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 105, *Executive Clemency*, § 105.04[3] (Matthew Bender).

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317. Former Testimony of Unavailable Witness

The testimony that _____ <*insert name of witness*> has given under oath (was/will be) (read to/played for) you because (he/she) is not available. You must evaluate this testimony by the same standards that you apply to a witness who testified here in court.

BENCH NOTES

Instructional Duty

The court has discretion to give an instruction on the weight a jury should give to former testimony of an unavailable witness. (*People v. Wharton* (1991) 53 Cal.3d 522, 598–599 [280 Cal.Rptr. 631, 809 P.2d 290].) No case holds that a trial court has a sua sponte duty to instruct on the use of former testimony of an unavailable witness.

AUTHORITY

- Instructional Requirements. *People v. Wharton* (1991) 53 Cal.3d 522, 598–599 [280 Cal.Rptr. 631, 809 P.2d 290].
- Admissibility of Former Testimony. Evid. Code, § 1291.
- Admissibility of Hearsay Evidence or Deposition Testimony Generally. Pen. Code, § 686(3).
- Former Testimony Defined. Evid. Code, § 1290.
- Unavailable Witness Defined. Evid. Code, § 240.
- Admissibility of Former Testimony as Substitute for Live Testimony. *People v. Reed* (1996) 13 Cal.4th 217, 225–226 [52 Cal.Rptr.2d 106, 914 P.2d 184].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 539.

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 18 et seq., 264 et seq.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[2], [3][o] (Matthew Bender).

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318. Prior Statements as Evidence

You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those) statement[s], you may use (that/those) statement[s] in two ways:

1. **To evaluate whether the witness's testimony in court is believable;**

AND

2. **As evidence that the information in (that/those) earlier statement[s] is true.**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026 [251 Cal.Rptr. 643, 761 P.2d 103].) Use this instruction when a testifying witness has been confronted with a prior inconsistent statement.

If prior testimony of an unavailable witness was impeached with a prior inconsistent statement, use CALCRIM No. 319, *Prior Statements of Unavailable Witness*. (*People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000].) If the prior statements were obtained by a peace officer in violation of *Miranda*, give CALCRIM No. 356, Miranda-*Defective Statements*.

AUTHORITY

- Instructional Requirements. *California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 489]; *People v. Cannady* (1972) 8 Cal.3d 379, 385–386 [105 Cal.Rptr. 129, 503 P.2d 585]; see Evid. Code, §§ 770, 791, 1235, 1236.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 157.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][b], Ch. 83, *Evidence*, § 83.13[3][e], [f], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

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319. Prior Statements of Unavailable Witness

_____ <*Insert name of unavailable witness*> did not testify in this trial, but (his/her) testimony, taken at another time, was (read/played) for you. In addition to this testimony, you have heard evidence that _____ <*insert name of unavailable witness*> made (another/other) statement[s]. [I am referring to the statement[s] about which _____ <*insert name[s]*> testified.]

If you conclude that _____ <*insert name of unavailable witness*> made (that/those) other statement[s], you may only consider (it/them) in a limited way. You may only use (it/them) in deciding whether to believe the testimony of _____ <*insert name of unavailable witness*> that was (read/played) here at trial. You may not use (that/those) other statement[s] as proof that the information contained in (it/them) is true, nor may you use (it/them) for any other reason.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026 [251 Cal.Rptr. 643, 761 P.2d 103].)

Give this instruction when prior inconsistent statements of an unavailable witness were admitted for impeachment purposes. (*People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000].) If a testifying witness was confronted with prior inconsistent statements, give CALCRIM No. 318, *Prior Statements as Evidence*. If the prior statements were obtained by a peace officer in violation of *Miranda*, give CALCRIM No. 356, Miranda-*Defective Statements*.

Evidence Code section 1294 creates an exception to the impeachment-only rule in *Williams* for the use of prior inconsistent statements given as testimony in a preliminary hearing or prior proceeding in the same criminal matter.

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AUTHORITY

- Instructional Requirements. *People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000]; see Evid. Code, §§ 145, 240, 770, 791, 1235, 1236, 1291.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 157.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[3][e] (Matthew Bender).

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320. Exercise of Privilege by Witness

A witness may refuse to answer questions that call for privileged information. Under the law, _____ <*insert name of witness*> was justified in refusing to answer certain questions. Do not consider (his/her) refusal to answer for any reason at all and do not guess what (his/her) answer would have been.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on the exercise of privilege by witnesses; however, it must be given on request. (Evid. Code, § 913(b); see also *People v. Mincey* (1992) 2 Cal.4th 408, 440–441 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Related Instructions

See CALCRIM No. 355, *Defendant's Right Not to Testify*.

AUTHORITY

- Instructional Requirements. Evid. Code, § 913(b); *People v. Mincey* (1992) 2 Cal.4th 408, 440–441 [6 Cal.Rptr.2d 822, 827 P.2d 388].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.06, Ch. 83, *Evidence*, § 83.09[2], [17], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

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(ii) Particular Types of Witnesses

330. Testimony of Child 10 Years of Age or Younger

You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony.

In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development.

When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate.

While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on child witnesses; however, it must be given on request. (Pen. Code, § 1127f.)

AUTHORITY

- Instructional Requirements. Pen. Code, § 1127f.

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 88(3).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, §§ 82.05[1], [2][a], [b], 82.07, 82.22[3][c], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

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RELATED ISSUES

Due Process/Equal Protection Challenges

"The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom 'traditional assumptions' may previously have biased the fact-finding process." (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392–1394 [7 Cal.Rptr.2d 660] [instructing jury to make credibility determinations based on child's age, level of cognitive development, and other factors surrounding child's testimony does not inflate testimony of child witness and thereby lessen prosecutor's burden of proof and deny defendant due process and equal protection].)

(New January 2006)

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331. Testimony of Person With Developmental, Cognitive, or Mental Disability

In evaluating the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment), consider all of the factors surrounding that person's testimony, including his or her level of cognitive development.

Even though a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness.

You should not discount or distrust the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] solely because he or she has such a (disability/ [or] impairment).

BENCH NOTES

Instructional Duty

This instruction must be given on request in any case "in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness . . . ." (Pen. Code, § 1127g.)

The court should consider whether this instruction is appropriate if the witness has a communication impairment that is not related to a deficiency in cognitive functioning.

AUTHORITY

- Statutory Authority. Pen. Code, § 1127g.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, §§ 82.05[2][a], 82.07, 82.22[3][c] (Matthew Bender).

(New January 2006)

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332. Expert Witness Testimony

(A witness was/Witnesses were) allowed to testify as [an] expert[s] and to give [an] opinion[s]. You must consider the opinion[s], but you are not required to accept (it/them) as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

[An expert witness may be asked a hypothetical question. A *hypothetical question* asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.]

[If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare the experts' qualifications.]

BENCH NOTES

Instructional Duty

When expert testimony is received at trial, the court must **sua sponte** instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.)

Give the bracketed paragraph beginning, "An expert witness may be asked a hypothetical question," if an expert witness responded to a hypothetical question.

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Give the bracketed paragraph beginning, "If the expert witnesses disagreed with one another," if there is conflicting expert testimony.

AUTHORITY

- Instructional Requirements. Pen. Code, § 1127b.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 642.

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 85.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][ii], 85.03[2][b], Ch. 86, *Insanity Trial*, § 86.04[3][a] (Matthew Bender).

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333. Opinion Testimony of Lay Witness

(A witness/Witnesses)[, who (was/were) not testifying as [an] expert[s],] gave (his/her/their) opinion[s] during the trial. You may but are not required to accept (that/those) opinion[s] as true or correct. You may give the opinion[s] whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

BENCH NOTES

Instructional Duty

Give this instruction on request when a lay witness gives opinion testimony.

Give the bracketed phrase "who was not testifying as an expert" if an expert witness also testified in the case.

Related Instructions

CALCRIM No. 332, *Expert Witness Testimony*.

CALCRIM No. 1860, *Owner's Opinion of Value*.

AUTHORITY

- Opinion Testimony. Evid. Code, §§ 800, 802.
- Opinion Testimony to Prove Character. Evid. Code, § 1100.
- Jury Must Decide What Weight to Give Lay Opinion. See *People v. Pena* (1977) 68 Cal.App.3d 100, 102–103 [135 Cal.Rptr. 602].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 3–25.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][d], Ch. 83, *Evidence*, § 83.11 (Matthew Bender).

(New January 2006)

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334. Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice

Before you may consider the (statement/ [or] testimony) of _____ <*insert name[s] of witness[es]*> as evidence against (the defendant/_____ <*insert names of defendants*>) [regarding the crime[s] of _____ <*insert name[s] of crime[s] if corroboration only required for some crime[s]*>], you must decide whether _____ <*insert name[s] of witness[es]*>) (was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;]/ [or] participate in a criminal conspiracy to commit the crime).**

The burden is on the defendant to prove that it is more likely than not that _____ <*insert name[s] of witness[es]*> (was/ were) [an] accomplice[s].

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.]

[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/ she) understood:

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1. The nature and effect of the criminal conduct;

2. That the conduct was wrongful and forbidden;

AND

3. That (he/she) could be punished for participating in the conduct.]

If you decide that a (declarant/ [or] witness) was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.

If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ <*insert charged crime[s]*> based on his or her (statement/ [or] testimony) alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if:

1. The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;

2. That supporting evidence is independent of the accomplice's (statement/ [or] testimony);

AND

3. That supporting evidence tends to connect the defendant to the commission of the crime[s].

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You

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may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section below.)

In a multiple codefendant case, if the corroboration requirement does not apply to all defendants, insert the names of the defendants for whom corroboration is required where indicated in the first sentence.

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If the witness was an accomplice to only one or some of the crimes he or she testified about, the corroboration requirement only applies to those crimes and not to other crimes he or she may have testified about. (*People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [331 P.2d 1040].) In such cases, the court may insert the specific crime or crimes requiring corroboration in the first sentence.

Give the bracketed paragraph that begins with "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness was an undercover police officer or an unwitting assistant.

Give the bracketed paragraph that begins with "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony. *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defendant's Burden of Proof. *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Accomplice Includes Coperpetrator. *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].
- Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved

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on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].

- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rtpr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

RELATED ISSUES

Out-of-Court Statements

The out-of court statement of a witness *may* constitute "testimony" within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

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> '[T]estimony' within the meaning of . . . section 1111 includes . . . all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. [Citation.] On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as 'testimony' and hence need not be corroborated under . . . section 1111.

(*People v. Williams, supra*, 16 Cal.4th at p. 245 [quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218 [43 Cal.Rptr.2d 526] [quotation marks, citations, and italics removed]; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [283 Cal.Rptr. 144, 812 P.2d 163] [out-of-court statement admitted as excited utterance did not require corroboration].) The court must determine whether the out-of-court statement requires corroboration and, accordingly, whether this instruction is appropriate. The court should also determine whether the statement is testimonial, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and whether the *Crawford* holding effects the corroboration requirement of Penal Code section 1111.

Incest With a Minor

Accomplice instructions are not appropriate in a trial for incest with a minor. A minor is a victim, not an accomplice, to incest. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see CALCRIM No. 1180, *Incest With a Minor*.)

Liable to Prosecution When Crime Committed

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However, the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

Threats and Fear of Bodily Harm

A person who is induced by threats and fear of bodily harm to participate in a crime, other than murder, is not an accomplice. (*People v. Brown*

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(1970) 6 Cal.App.3d 619, 624 [86 Cal.Rptr. 149]; *People v. Perez* (1973) 9 Cal.3d 651, 659–660 [108 Cal.Rptr. 474, 510 P.2d 1026].)

Defense Witness

"[A]lthough an accomplice witness instruction must be properly formulated . . . , there is no error in giving such an instruction when the accomplice's testimony favors the defendant." (*United States v. Tirouda* (2005) 394 F.3d 683, 688.)

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335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

If the crime[s] of _____ <*insert charged crime[s]*> (was/were) committed, then _____ <*insert name[s] of witness[es]*> (was/were) [an] accomplice[s] to (that/those) crime[s].

You may not convict the defendant of _____ <*insert crime[s]*> based on the (statement/ [or] testimony) of an accomplice alone. You may use the (statement]/ [or] testimony) of an accomplice to convict the defendant only if:

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**
2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

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BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

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AUTHORITY

- Instructional Requirements. Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony. *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817 793 P.2d 23].
- Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

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336. In-Custody Informant

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

[An *in-custody informant* is someone[, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose testimony is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution.]

[_____ <*insert name of witness*> is an *in-custody informant.*]

[_____ <*insert name of institution*> is a correctional institution.]

BENCH NOTES

Instructional Duty

The court must give this instruction on request. (Pen. Code, § 1127a.)

The court should also be aware of the following statutory provisions relating to in-custody informants: Penal Code sections 1127a(c) [prosecution must disclose consideration given to witness]; 1191.25 [prosecution must notify victim of in-custody informant]; and 4001.1 [limitation on payments to in-custody informants and action that may be taken by in-custody informant].

If there is no issue over whether the witness is an in-custody informant and the parties agree, the court may instruct the jury that the witness "is an in-custody informant." If there is an issue over whether the witness is an in-custody informant, give the bracketed definition of the term.

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Related Instruction

CALCRIM No. 337, *Witness in Custody or Physically Restrained*.

AUTHORITY

- Instructional Duty. Pen. Code, § 1127a.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, § 653.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.32[2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03A, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b] (Matthew Bender).

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337. Witness in Custody or Physically Restrained

<Alternative A—physically restrained>

[When _____ <*insert name[s] of witness[es]*> testified, (he/she/they) (was/were) physically restrained. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations. Evaluate the witness's testimony according to the instructions I have given you.]

<Alternative B—in custody>

[When _____ <*insert name[s] of witness[es]*> testified, (he/she/they) (was/were) in custody. [Do not speculate about the reason.] The fact that a witness is in custody does not by itself make a witness more or less believable. Evaluate the witness's testimony according to the instructions I have given you.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the witness has been physically restrained in a manner that is visible to the jury. (See *People v. Duran* (1976) 16 Cal.3d 282, 291–292 [127 Cal.Rptr. 618, 545 P.2d 1322]; *Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1485; *People v. Metzger* (1904) 143 Cal. 447, 448 [77 P. 155].) If the restraints are not visible, do not give this instruction unless requested. For an in-custody witness, give this instruction on request.

Do not give this instruction for an in-custody informant unless the witness is also physically restrained. When an in-custody informant testifies, the court must give CALCRIM No. 336, *In-Custody Informant*. For an in-custody informant, the court may only give this instruction if it is limited to the issue of physical restraints.

In alternative B, always give the bracketed sentence that begins with "Do not speculate" unless the jury has been informed of the reason the witness is in custody.

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The rules articulated in *People v. Duran* (1976) 16 Cal.3d 282, 290–292 [127 Cal.Rptr. 618, 545 P.2d 1322] regarding physical restraints of a defendant at trial also apply to physical restraint of a defense witness. (*Id.* at p. 288, fn. 4.)

AUTHORITY

- Instructional Duty. *People v. Duran* (1976) 16 Cal.3d 282, 291–292 [127 Cal.Rptr. 618, 545 P.2d 1322]; *Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1485; *People v. Metzger* (1904) 143 Cal. 447, 448 [77 P. 155].
- Requirements Before Restraints Used. *People v. Duran* (1976) 16 Cal.3d 282, 290–292 [127 Cal.Rptr. 618, 545 P.2d 1322]; *People v. Mar* (2002) 28 Cal.4th 1201, 1218 [124 Cal.Rptr.2d 161, 52 P.3d 95].
- Use of Stun Belts. *People v. Mar* (2002) 28 Cal.4th 1201, 1205–1206 [124 Cal.Rptr.2d 161, 52 P.3d 95].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, §§ 11–16.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.09[6][b][v] (Matthew Bender).

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C. CHARACTER EVIDENCE

350. Character of Defendant

You have heard character testimony that the defendant (is a _____ <*insert character trait*> person/ [or] has a good reputation for _____ <*insert character trait*> in the community where (he/she) lives or works).

You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

Evidence of the defendant's character for _____ <*insert character trait*> can by itself create a reasonable doubt. However, evidence of the defendant's good character may be countered by evidence of (his/her) bad character for the same trait. You must decide the meaning and importance of the character evidence.

[If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.]

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's character; however, it must be given on request. (*People v. Bell* (1875) 49 Cal. 485, 489–490 [jury should be instructed that evidence of good reputation should be weighed as any other fact established and may be sufficient to create reasonable doubt of guilt]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [266 P.2d 38] [character evidence may be sufficient to create reasonable doubt of guilt]; *People v. Wilson* (1913) 23 Cal.App. 513, 523–524 [138 P. 971] [court erred in failing to give requested instruction or any instruction on character evidence].)

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AUTHORITY

- Instructional Requirements. *People v. Bell* (1875) 49 Cal. 485, 489–490; *People v. Wilson* (1913) 23 Cal.App. 513, 523–524 [138 P. 971]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [266 P.2d 38].
- Admissibility. Evid. Code, §§ 1100–1102.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 53.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][d], [e][ii], Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

RELATED ISSUES

No Discussion of Character Is Evidence of Good Character

The fact that the defendant's character or reputation has not been discussed or questioned among those who know him or her is evidence of the defendant's good character and reputation. (*People v. Castillo* (1935) 5 Cal.App.2d 194, 198 [42 P.2d 682].) However, the defendant must have resided in the community for a sufficient period of time and become acquainted with the community in order for his or her character to have become known and for some sort of reputation to have been established. (See Evid. Code, § 1324 [reputation may be shown in the community where defendant resides and in a group with which he or she habitually associates]; see also *People v. Pauli* (1922) 58 Cal.App. 594, 596 [209 P. 88] [witness's testimony about defendant's good reputation in community was inappropriate where defendant was a stranger in the community, working for a single employer for a few months, going about little, and forming no associations].)

Business Community

The community for purposes of reputation evidence may also be the defendant's business community and associates. (*People v. Cobb* (1955) 45 Cal.2d 158, 163 [287 P.2d 752].)

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351. Cross-Examination of Character Witness

The attorney for the People was allowed to ask defendant's character witness[es] if (he/she/they) had heard that the defendant had engaged in certain conduct. These "have you heard" questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate the meaning and importance of (the/a) character witness's testimony.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on cross-examination of character witnesses; however it must be given on request. (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954 [196 Cal.Rptr. 412] [when cross-examination of character witness is permitted, a limiting admonition should be given]; Evid. Code, § 355.)

AUTHORITY

- Instructional Requirements. *People v. Hempstead* (1983) 148 Cal.App.3d 949, 954 [196 Cal.Rptr. 412]; *People v. Eli* (1967) 66 Cal.2d 63, 79 [56 Cal.Rptr. 916, 424 P.2d 356].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 243.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][d], Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][b], Ch. 87, *Death Penalty*, § 87.23[5] (Matthew Bender).

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D. DEFENDANT'S TESTIMONY AND STATEMENTS

355. Defendant's Right Not to Testify

A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

BENCH NOTES

Instructional Duty

This instruction should only be given on request. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *People v. Evans* (1998) 62 Cal.App.4th 186, 191 [72 Cal.Rptr.2d 543].)

The court has no sua sponte duty to seek a personal waiver of the instruction from the defendant. (*People v. Towey* (2001) 92 Cal.App.4th 880, 884 [112 Cal.Rptr.2d 326].)

The United States Supreme Court has held that the court may give this instruction over the defendant's objection (*Lakeside v. Oregon* (1978) 435 U.S. 333, 340–341 [98 S.Ct. 1091, 55 L.Ed.2d 319]), but as a matter of state judicial policy, the California Supreme Court has found otherwise. (*People v. Roberts* (1992) 2 Cal.4th 271, 314 [6 Cal.Rptr.2d 276, 826 P.2d 274] ["[T]he purpose of the instruction is to protect the defendant, and if the defendant does not want it given the trial court should accede to that request, notwithstanding the lack of a constitutional requirement to do so."].)

AUTHORITY

- Instructional Requirements. *People v. Lewis* (1990) 50 Cal.3d 262, 282 [266 Cal.Rptr. 834, 786 P.2d 892] [no sua sponte duty to instruct].

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Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 642, 658.

2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 439.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.08, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.04[2][b] (Matthew Bender).

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356. *Miranda*-Defective Statements

You have heard evidence that the defendant made a statement to a peace officer. [I am referring to the statement (about which Officer[s] _____ testified/_____ <*insert other description to identify statement, e.g., time and place statement was taken*>).]

If you conclude that the defendant made this statement, you may consider it only to help you decide whether to believe the defendant's testimony. You may not consider it as proof that the statement is true or for any other purpose.

[You should view an unrecorded oral statement cautiously.]

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give a limiting instruction on the use of statements taken in violation of the *Miranda* rule. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63 [17 Cal.Rptr.3d 710, 96 P.3d 30].) The court must give the instruction on request.

If the defendant made more than one statement, but not all of the statements are subject to the limiting admonition, specify the relevant statement or statements using the bracketed text in the first paragraph.

AUTHORITY

- Instructional Requirements. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63 [17 Cal.Rptr.3d 710, 96 P.3d 30]; *People v. May* (1988) 44 Cal.3d 309 [243 Cal.Rptr. 369, 748 P.2d 307]; *Harris v. New York* (1971) 401 U.S. 222 [91 S.Ct. 643, 28 L.Ed.2d 1].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 318–320.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, §§ 30.02[2], 30.10[3], 30.30[1], 30.57 (Matthew Bender).

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

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357. Adoptive Admissions

If you conclude that someone made a statement outside of court that (accused the defendant of the crime/ [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

1. **The statement was made to the defendant or made in (his/her) presence;**
2. **The defendant heard and understood the statement;**
3. **The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true;**

AND

4. **The defendant could have denied it but did not.**

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

[You must not consider this evidence in determining the guilt of (the/any) other defendant[s].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the foundational requirements for adoptive admissions if such evidence is admitted. (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 381 [158 Cal.Rptr. 6], citing *People v. Atwood* (1963) 223 Cal.App.2d 316, 332–334 [35 Cal.Rptr. 831]; see also *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1336 [230 Cal.Rptr. 536].)

If the court instructs on adoptive admissions, the court also has a **sua sponte** duty to instruct on corpus delicti. (See CALCRIM No. 359, *Corpus*

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Delicti: Independent Evidence of a Charged Crime; see also *People v. Jennings* (1991) 53 Cal.3d 334, 364 [279 Cal.Rptr. 780, 807 P.2d 1009] [discussing corpus delicti rule in the case of an affirmative admission; by analogy the rule also should apply to adoptive admissions].)

The limiting admonition in the last sentence of the instruction must be given on request when other co-defendants are on trial. (*People v. Richards* (1976) 17 Cal.3d 614, 618–619 [131 Cal.Rptr. 537, 552 P.2d 97], disapproved on other grounds in *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126 [43 Cal.Rptr.2d 681, 899 P.2d 67]; see generally Evid. Code, § 355.)

Do not give this instruction if the defendant's failure to reply was based on his or her invocation of the right to remain silent. (See *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]; *People v. Cockrell* (1965) 63 Cal.2d 659 [47 Cal.Rptr. 788, 408 P.2d 116].)

AUTHORITY

- Instructional Requirements. *People v. Atwood* (1963) 223 Cal.App.2d 316, 332–333 [35 Cal.Rptr. 831]; *People v. Vindiola* (1979) 96 Cal.App.3d 370 [158 Cal.Rptr. 6]; *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1336 [230 Cal.Rptr. 536]; see *People v. Riel* (2000) 22 Cal.4th 1153, 1189 [96 Cal.Rptr.2d 1, 998 P.2d 969].

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 314(b)

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 102–105.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, §§ 30.04[4], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[3][b] (Matthew Bender).

RELATED ISSUES

Defendant Intoxicated When Admission Made

"Declarations of a prisoner under the influence of intoxicants are not rendered inadmissible by reason of his drunkenness. That condition would

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go only to the weight of the evidence." (*People v. MacCagnan* (1954) 129 Cal.App.2d 100, 112 [276 P.2d 679].)

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358. Evidence of Defendant's Statements

You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether or not the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such [a] statement[s].

[You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give the bracketed cautionary instruction for evidence of out-of-court oral statements made by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1].) The only exception to this is in the penalty phase of a capital trial; then, there is no sua sponte duty to instruct, although the bracketed paragraph should be given if requested. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961) 195 Cal.App.2d 829, 833 [16 Cal.Rptr. 256]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398], disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40 [175 Cal.Rptr. 738, 631 P.2d 446]; *People v. Scherr* (1969) 272 Cal.App.2d 165, 172 [77 Cal.Rptr. 35]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [120 Cal.Rptr.2d 477, 47 P.3d 262] [admonition to view non-recorded statements with caution applies only to a defendant's incriminating statements].) If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the bracketed paragraph. If the jury heard only exculpatory statements by the defendant, do not give the bracketed paragraph.

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When a defendant's statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction does not apply. (*People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509].)

Related Instructions

If out-of-court oral statements made by the defendant are prominent pieces of evidence in the trial, then CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*, may also have to be given together with the bracketed cautionary instruction.

AUTHORITY

- Instructional Requirements. *People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1]; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 614, 641, 650.

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 51.

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 113.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.57 (Matthew Bender).

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359. Corpus Delicti: Independent Evidence of a Charged Crime

The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you conclude that other evidence shows that the charged crime [or a lesser included offense] was committed.

That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone.

You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on corpus delicti whenever an accused's extrajudicial statements form part of the prosecution's evidence. (*People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].)

The corpus delicti cannot be proved by statements made before or after the crime, but can be proved by statements made during the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

Give the bracketed language in the first paragraph if the court will be instructing on lesser included offenses.

Related Instructions

Since the corpus delicti instruction concerns statements of guilt by the defendant, this instruction must always be given along with CALCRIM No. 358, *Evidence of Defendant's Statements*. If the statements are reported oral statements, the bracketed cautionary paragraph in CALCRIM No. 358 must also be given.

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AUTHORITY

- Instructional Requirements. *People v. Ray* (1996) 13 Cal.4th 313, 342 [52 Cal.Rptr.2d 296, 914 P.2d 846]; *People v. Jennings* (1991) 53 Cal.3d 334, 368 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].
- Burden of Proof. *People v. Lara* (1994) 30 Cal.App.4th 658, 676.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 45–52.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, §§ 30.04[2], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][c], Ch. 87, *Death Penalty*, § 87.13[17][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.01 (Matthew Bender).

COMMENTARY

Harm Caused by Criminal Conduct

The instruction states that the other evidence need only "be enough to support a reasonable inference that someone's criminal conduct caused an injury, loss, or harm." This is based in part on *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [119 Cal.Rptr.2d 903, 46 P.3d 372], in which the court stated that "[t]here is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency." (Citing *People v. Jones* (1998) 17 Cal.4th 279, 303 [70 Cal.Rptr.2d 793, 949 P.2d 890].)

Scope of Corpus Delicti

The following are not elements of a crime and need not be proved by independent evidence: the degree of the crime charged (*People v. Cooper* (1960) 53 Cal.2d 755, 765 [3 Cal.Rptr. 148, 349 P.2d 964]), the identity of the perpetrator (*People v. Westfall* (1961) 198 Cal.App.2d 598, 601 [18 Cal.Rptr. 356]), elements of the underlying felony when the defendant is

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charged with felony murder (*People v. Cantrell* (1973) 8 Cal.3d 672, 680–681 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), special circumstances when the defendant is charged with a felony-based special circumstance murder as listed in Penal Code section 190.2(a)(17) (Pen. Code, § 190.41; see *People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13 [52 Cal.Rptr.2d 296, 914 P.2d 846]), the knowledge and intent required for aider-abettor liability (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128–1129 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Ott* (1978) 84 Cal.App.3d 118, 131 [148 Cal.Rptr. 479]), or facts necessary for a sentencing enhancement (see *People v. Shoemake* (1993) 16 Cal.App.4th 243, 252–256 [20 Cal.Rptr.2d 36]).

RELATED ISSUES

Truth-in-Evidence Initiative

The "truth-in-evidence" provision of the California Constitution abrogates the corpus delicti rule insofar as it restricts the admissibility of incriminatory extrajudicial statements by an accused. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173–1174 [119 Cal.Rptr.2d 903, 46 P.3d 372]; see Cal. Const., art. I, § 28(d) [Proposition 8 of the June 8, 1982 General Election].) The constitutional provision, however, does not eliminate the rule insofar as it prohibits *conviction* when the only evidence that the crime was committed is the defendant's own statements outside of court. Thus, the provision does not affect the rule to the extent it requires a jury instruction that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1180.)

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360. Statements to an Expert

_____ <*Insert name*> testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement[s] made by _____ <*insert name*>. [I am referring only to the statement[s] _____ <*insert or describe statements admitted for this limited purpose*>.] You may consider (that/those) statement[s] only to evaluate the expert's opinion. Do not consider (that/those) statements as proof that the information contained in the statement[s] is true.

BENCH NOTES

Instructional Duty

Although the court has no sua sponte duty to give this instruction, it should be given if appropriate under the circumstances. (*People v. Cantrell* (1973) 8 Cal.3d 672, 683 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].)

This instruction should not be given if all of the statements relied on by the expert were admitted under applicable hearsay exceptions. If some but not all of the defendant's statements were admitted for the limited purpose of evaluating the expert's testimony, specify those statements in the bracketed sentence.

AUTHORITY

- Instructional Requirements. *In re Spencer* (1965) 63 Cal.2d 400, 412 [46 Cal.Rptr. 753, 406 P.2d 33].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 113.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04 (Matthew Bender).

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][b] (Matthew Bender).

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361. Failure to Explain or Deny Adverse Testimony

If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt.

If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.

BENCH NOTES

Instructional Duty

No authority imposes a duty to give this instruction sua sponte. This instruction should only be given when the defendant testifies and the privilege against self-incrimination has not been successfully invoked. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181]; *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1118 [196 Cal.Rptr. 450].)

Before an instruction on this principle may be given, the trial court must ascertain as a matter of law: (1) if a question was asked that called for an explanation or denial of incriminating evidence; (2) if the defendant knew the facts necessary to answer the question or if some circumstance precluded the defendant from knowing such facts; and (3) if the defendant failed to deny or explain the incriminating evidence when answering the question. (*People v. Saddler* (1979) 24 Cal.3d 671, 682–683 [156 Cal.Rptr. 871, 597 P.2d 130] [instruction erroneously given because there was no evidence that defendant failed to deny or explain incriminating evidence]; *People v. Marsh* (1985) 175 Cal.App.3d 987, 994 [221 Cal.Rptr. 311] [same]; *People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr. 757] [same]; see also *People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260].)

Contradiction of the state's evidence is not by itself a failure to deny or explain. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 [180 Cal.Rptr. 76].) Failure to recall is not an appropriate basis for this

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instruction. (*People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr. 757].)

One court has cautioned against giving this instruction unless both parties agree and there is a significant omission on the part of the defendant to explain or deny adverse evidence. (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119–1120 [196 Cal.Rptr. 450].)

AUTHORITY

- Instructional Requirements. Evid. Code, § 413.
- Cautionary Language. *People v. Saddler* (1979) 24 Cal.3d 671, 683 [156 Cal.Rptr. 871, 597 P.2d 130].

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 440, 441.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.08[6][a][i], Ch. 83, *Evidence*, § 83.01[2][b], Ch. 85, *Submission to Jury and Verdict*, §§ 85.01[5], 85.04[2][b] (Matthew Bender).

RELATED ISSUES

Bizarre or Implausible Answers

If the defendant's denial or explanation is bizarre or implausible, several courts have held that the question whether his or her response is reasonable should be given to the jury with an instruction regarding adverse inferences. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181]; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392–393 [213 Cal.Rptr. 353].) However, in *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [245 Cal.Rptr. 750], the court stated, "the test for giving the instruction [on failure to deny or explain] is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear."

Facts Beyond the Scope of Examination

If the defendant has limited his or her testimony to a specific factual issue, it is error for the prosecutor to comment, or the trial court to instruct, on

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his or her failure to explain or deny other evidence against him or her that is beyond the scope of this testimony. (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604–607 [122 Cal.Rptr. 144].)

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362. Consciousness of Guilt: False Statements

If [the] defendant [_____ <*insert name of defendant when multiple defendants on trial*>] made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [You may not consider the statement in deciding any other defendant's guilt.]

If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on consciousness of guilt when there is evidence that the defendant intentionally made a false statement from which such an inference could be drawn. (*People v. Atwood* (1963) 223 Cal.App.2d 316, 333–334 [35 Cal.Rptr. 831]; see also *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103–1104 [10 Cal.Rptr.2d 821] [approving instruction on this point].)

This instruction should not be given unless it can be inferred that the defendant made the false statement for self-protection rather than to protect someone else. (*People v. Rankin* (1992) 9 Cal.App.4th 430 [11 Cal.Rptr.2d 735] [error to instruct on false statements and consciousness of guilt where defendant lied to protect an accomplice]; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839 [82 Cal.Rptr. 839].)

AUTHORITY

- Instructional Requirements. *People v. Atwood* (1963) 223 Cal.App.2d 316, 333 [35 Cal.Rptr. 831]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102–103 [17 Cal.Rptr.3d 710, 96 P.3d 30].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 110.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[1], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

COMMENTARY

The word "willfully" was not included in the description of the making of the false statement. Although one court suggested that the jury be explicitly instructed that the defendant must "willfully" make the false statement (*People v. Louis* (1984) 159 Cal.App.3d 156, 161–162 [205 Cal.Rptr. 306]), the California Supreme Court subsequently held that such language is not required. (*People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9 [286 Cal.Rptr. 801, 818 P.2d 84].)

RELATED ISSUES

Evidence

The false nature of the defendant's statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence. (*People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803] [overruling line of cases that required falsity to be demonstrated only by defendant's own testimony or statements]; accord *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103 [10 Cal.Rptr.2d 821]; *People v. Williams* (1995) 33 Cal.App.4th 467, 478–479 [39 Cal.Rptr.2d 358].)

Un-Mirandized Voluntary Statement

The *Miranda* rule (*Miranda v. Arizona* (1966) 384 U.S. 436, 444, 479 [86 S.Ct. 1602, 16 L.Ed.2d 694]) does not prohibit instructing the jury that it may draw an inference of guilt from a willfully false or deliberately misleading un-*Mirandized* statement that the defendant voluntarily introduces into evidence on direct examination. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1166–1169 [94 Cal.Rptr.2d 727].)

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363–369. Reserved for Future Use

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E. PARTICULAR TYPES OF EVIDENCE

370. Motive

The People are not required to prove that the defendant had a motive to commit (any of the crimes/the crime) charged. In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

BENCH NOTES

Instructional Duty

The court does not have a sua sponte duty to instruct on motive. (*People v. Romo* (1975) 14 Cal.3d 189, 196 [121 Cal.Rptr. 111, 534 P.2d 1015] [not error to refuse instruction on motive].)

Do not give this instruction if motive is an element of the crime charged. (See, e.g., CALCRIM No. 1122, *Annoying or Molesting a Child.*)

AUTHORITY

- Instructional Requirements. *People v. Romo* (1975) 14 Cal.3d 189, 195–196 [121 Cal.Rptr. 111, 534 P.2d 1015]; *People v. Young* (1970) 9 Cal.App.3d 106, 110 [87 Cal.Rptr. 767].
- Jury May Consider Motive. *People v. Brown* (1900) 130 Cal. 591, 594 [62 P. 1072]; *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877–878 [198 P.2d 81].
- Proof of Presence or Absence of Motive Not Required. *People v. Daly* (1992) 8 Cal.App.4th 47, 59 [10 Cal.Rptr.2d 21]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017–1018 [80 Cal.Rptr.2d 676].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 4; Defenses, § 249.

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1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 119.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

RELATED ISSUES

Entrapment Defense

The court should not instruct on motive if the defendant admits his guilt for the substantive crime and presents an entrapment defense, because in that instance his or her commission of the crime would not be an issue and motive would be irrelevant. (See *People v. Martinez* (1984) 157 Cal.App.3d 660, 669 [203 Cal.Rptr. 833]; *People v. Lee* (1990) 219 Cal.App.3d 829, 841 [268 Cal.Rptr. 595].)

No Conflict With Other Instructions

Motive, intent, and malice are separate and distinct mental states. Giving a motive instruction does not conflict with intent and malice instructions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503–504 [117 Cal.Rptr.2d 45, 40 P.3d 754] [motive describes the reason a person chooses to commit a crime]; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098 [24 Cal.Rptr.2d 922].) Similarly, a motive instruction that focuses on guilt does not conflict with a special circumstance instruction, which the jury is directed to find true or not true. (*People v. Heishman* (1988) 45 Cal.3d 147, 178 [246 Cal.Rptr. 673, 753 P.2d 629] [defendant argued motive to prevent victim from testifying was at core of special circumstance].) A torture murder instruction that requires an intent to cause cruel pain or suffering for the purpose of revenge, extortion, or any sadistic purpose also does not conflict with the motive instruction. The torture murder instruction does not elevate motive to the status of an element of the crime. It simply makes explicit the treatment of motive as an element of proof in torture murder cases. (*People v. Lynn* (1984) 159 Cal.App.3d 715, 727–728 [206 Cal.Rptr. 181].)

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371. Consciousness of Guilt: Suppression and Fabrication of Evidence

<Alternative A—suppression>

[If the defendant tried to hide evidence or discourage someone from testifying against (him/her), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.]

<Alternative B—fabrication>

[If the defendant tried to create false evidence or obtain false testimony, that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.]

<Alternative C—fabrication or suppression by a third party>

[If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.]

<Give final paragraph if multiple defendants on trial>

[If you conclude that a defendant (tried to hide evidence[,]/ discouraged someone from testifying[,]/ [or] authorized another person to (hide evidence/ [or] discourage a witness)), you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty.]

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BENCH NOTES

Instructional Duty

No authority imposes a duty to give this instruction sua sponte. However, *People v. Atwood* (1963) 223 Cal.App.2d 316 [35 Cal.Rptr. 831] held that the court had a **sua sponte** duty, under the circumstances of that case, to instruct on consciousness of guilt based on defendant's false statements because they pertained to the vital question of whether defendant admitted his guilt. (*Id.* at pp. 333–334.)

AUTHORITY

- Instructional Requirements. *People v. Atwood* (1963) 223 Cal.App.2d 316 [35 Cal.Rptr. 831]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102–103 [17 Cal.Rptr.3d 710, 96 P.3d 30].
- Fabrication or Suppression of Evidence. Evid. Code, § 413; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224–1225 [56 Cal.Rptr.2d 49, 920 P.2d 1254]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1138–1140 [36 Cal.Rptr.2d 235, 885 P.2d 1].
- Suppression of Evidence. Evid. Code, § 413; see *People v. Farnam* (2002) 28 Cal.4th 107, 165 [121 Cal.Rptr.2d 106, 47 P.3d 988] [instruction referring to defendant's refusal to provide blood or hair sample was not an erroneous pinpoint instruction].
- Defendant Present or Authorized Suppression by Third Party. *People v. Hannon* (1977) 19 Cal.3d 588, 597–600 [138 Cal.Rptr. 885, 564 P.2d 1203]; *People v. Weiss* (1958) 50 Cal.2d 535, 554 [327 P.2d 527]; *People v. Kendall* (1952) 111 Cal.App.2d 204, 213–214 [244 P.2d 418].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 111, 112.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

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372. Defendant's Flight

If the defendant fled [or tried to flee] (immediately after the crime was committed/ [or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on flight whenever the prosecution relies on evidence of flight to show consciousness of guilt. (*People v. Williams* (1960) 179 Cal.App.2d 487, 491 [3 Cal.Rptr. 782].) There is, however, no reciprocal duty to instruct on the significance of the absence of flight, even on request. (*People v. Staten* (2000) 24 Cal.4th 434, 459 [101 Cal.Rptr.2d 213, 11 P.3d 968]; *People v. Williams* (1997) 55 Cal.App.4th 648, 651 [64 Cal.Rptr.2d 203].)

If the defendant's flight did not occur immediately after the crime was committed, the trial court should give the second option in the parenthetical. (*People v. Carrera* (1989) 49 Cal.3d 291, 313 [261 Cal.Rptr. 348, 777 P.2d 121] [flight from county jail]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1712 [53 Cal.Rptr.2d 702] [where flight was from custody, the instructional language "immediately after the commission of a crime" was irrelevant but harmless].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 1127c; *People v. Williams* (1960) 179 Cal.App.2d 487, 491 [3 Cal.Rptr. 782]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054–1055 [60 Cal.Rptr.2d 225, 929 P.2d 544]; see *People v. Mendoza* (2000) 24 Cal.4th 130, 179–180 [99 Cal.Rptr.2d 485, 6 P.3d 150].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 106–109.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][ii], 85.03[2][c] (Matthew Bender).

RELATED ISSUES

Flight, Meaning

Flight does not require a person to physically run from the scene or make an escape. What is required is acting with the purpose of avoiding observation or arrest. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [60 Cal.Rptr.2d 225, 929 P.2d 544] [defendant fled when he left victim's apartment after killing her, told the assistant manager, "I really got to get the hell out of here," returned to his apartment, packed his belongings, asked a former girlfriend who lived out of the area if he could stay with her, and repeatedly pleaded with his roommate to drive him out of town].)

Identity at Issue

If evidence identifies the defendant as the person who fled, and this evidence is relied on as tending to show guilt, then it is not error to instruct the jury on flight. (*People v. Mason* (1991) 52 Cal.3d 909, 943 [227 Cal.Rptr. 166, 802 P.2d 950].)

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373. Other Perpetrator

The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has/those other persons have) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged.

[This instruction does not apply to the testimony of _____ <*insert names of testifying coparticipants*>.]

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on unjoined co-participants; however, it must be given on request. (See *People v. Sanders* (1990) 221 Cal.App.3d 350, 359 [271 Cal.Rptr. 534].)

If other alleged participants in the crime are testifying, this instruction should not be given or the bracketed portion should be given exempting the testimony of those witnesses. (*People v. Carrera* (1989) 49 Cal.3d 291, 312 [261 Cal.Rptr. 348, 777 P.2d 121]; *People v. Sully* (1991) 53 Cal.3d 1195, 1218 [283 Cal.Rptr. 144, 812 P.2d 163]; *People v. Williams* (1997) 16 Cal.4th 153, 226–227 [66 Cal.Rptr.2d 123, 940 P.2d 710].) It is not error to give the first paragraph of this instruction if a reasonable juror would understand from all the instructions that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility. (*People v. Fonseca* (2003) 105 Cal.App.4th 543, 549–550 [129 Cal.Rptr.2d 513].)

AUTHORITY

- Instructional Requirements. *People v. Farmer* (1989) 47 Cal.3d 888, 918–919 [254 Cal.Rptr. 508, 765 P.2d 940], disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 [94 Cal.Rptr.2d 396, 996 P.2d 46]; *People v. Sanders* (1990) 221 Cal.App.3d 350, 359 [271 Cal.Rptr. 534].

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Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][d] (Matthew Bender).

RELATED ISSUES

Jury Can Still Consider Evidence That Someone Else Was the Perpetrator

"The instruction does not tell the jury it cannot consider evidence that someone else was the perpetrator. It merely says the jury is not to speculate on whether someone else might or might not be prosecuted." (*People v. Farmer* (1989) 47 Cal.3d 888, 918–919 [254 Cal.Rptr. 508, 765 P.2d 940], disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 [94 Cal.Rptr.2d 396, 996 P.2d 46].)

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374. Dog Tracking Evidence

You have received evidence about the use of a tracking dog. You may not conclude that the defendant is the person who committed the crime based only on the fact that a dog indicated the defendant [or a location]. Before you may rely on dog tracking evidence, there must be:

1. **Evidence of the dog's general reliability as a tracker;**

AND

2. **Other evidence that the dog accurately followed a trail that led to the person who committed the crime. This other evidence does not need to independently link the defendant to the crime.**

In deciding the meaning and importance of the dog tracking evidence, consider the training, skill, and experience, if any, of the dog, its trainer, and its handler, together with everything else that you learned about the dog's work in this case.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on tracking dogs whenever they are used to prove the identity of a defendant. (*People v. Malgren* (1983) 139 Cal.App.3d 234, 241 [188 Cal.Rptr. 569], disapproved on other grounds in *People v. Jones* (1991) 53 Cal.3d 1115, 1144 [282 Cal.Rptr. 465, 811 P.2d 757].)

AUTHORITY

- Instructional Requirements. *People v. Craig* (1978) 86 Cal.App.3d 905, 917–918 [150 Cal.Rptr. 676].
- Dog Tracking Evidence Need Not Be Viewed With Caution. *People v. Malgren* (1983) 139 Cal.App.3d 234, 241 [188 Cal.Rptr. 569], disapproved on other grounds in *People v. Jones* (1991) 53 Cal.3d 1115, 1144 [282 Cal.Rptr. 465, 811 P.2d 757].
- Corroboration Requirement. *People v. Gonzales* (1990) 218 Cal.App.3d 403, 410 [267 Cal.Rptr. 138].

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Secondary Sources

1 Witkin California Evidence (4th ed. 2000) Opinion Evidence, § 77.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][ii] (Matthew Bender).

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375. Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.

<Introductory Sentence Alternative A—evidence of other offense admitted>

[The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of _____ <*insert description of alleged offense[s]*>) that (was/were) not charged in this case.]

<Introductory Sentence Alternative B—evidence of other act admitted>

[The People presented evidence (of other behavior by the defendant that was not charged in this case/that the defendant _____ <*insert description of alleged conduct admitted under Evid. Code, § 1101(b)*>).]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden, you must disregard this evidence entirely.

If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

<SELECT SPECIFIC GROUNDS OF RELEVANCE AND DELETE ALL OTHER OPTIONS.>

<A. Identity>

[The defendant was the person who committed the offense[s] alleged in this case](./; or)

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<B. Intent>

[The defendant acted with the intent to _____ *<insert specific intent required to prove the offense[s] alleged>* **in this case](./; or)**

<C. Motive>

[The defendant had a motive to commit the offense[s] alleged in this case](./; or)

<D. Knowledge>

[The defendant knew _____ *<insert knowledge required to prove the offense[s] alleged>* **when (he/she) allegedly acted in this case](./; or)**

<E. Accident>

[The defendant's alleged actions were the result of mistake or accident](./; or)

<F. Common Plan>

[The defendant had a plan [or scheme] to commit the offense[s] alleged in this case](./; or)

<G. Consent>

[The defendant reasonably and in good faith believed that _____ *<insert name or description of complaining witness>* **consented](./; or)**

<H. Other Purpose>

[The defendant _____ *<insert description of other permissible purpose; see Evid. Code, § 1101(b)>***.]**

[In evaluating this evidence, consider the similarity or lack of similarity between the uncharged (offense[s]/ [and] act[s]) and the charged offense[s].]

Do not consider this evidence for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***].**

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[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged offense[s]*>. The People must still prove each element of (the/ every) charge beyond a reasonable doubt.

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].) The court is only required to give this instruction **sua sponte** in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie, supra,* 30 Cal.3d at pp. 63–64.)

Do not give this instruction in the penalty phase of a capital case. (See CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes*.)

If evidence of uncharged conduct is admitted *only* under Evidence Code section 1108 or 1109, **do not** give this instruction. (See CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*; CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*; and CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person*.)

If the court admits evidence of uncharged conduct amounting to a criminal offense, give introductory sentence alternative A and select the words "uncharged offense[s]" where indicated. If the court admits evidence under Evidence Code section 1101(b) that does not constitute a criminal offense, give introductory sentence alternative B and select the word "act[s]" where indicated. (*People v. Enos* (1973) 34 Cal.App.3d 25, 42 [109 Cal.Rptr. 876] [evidence tending to show defendant was "casing" a home admitted to prove intent where burglary of another home charged and defendant asserted he was in the second home by accident].) The court is not

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required to identify the specific acts to which this instruction applies. (*People v. Nicolas* (2004) 34 Cal.4th 614, 668 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1101(b), then the court must specify for the jury what evidence it may consider under section 1101(b). (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771], superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742].) In alternative A, insert a description of the uncharged offense allegedly shown by the 1101(b) evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then the court may give the alternative "another offense" or "other offenses" without specifying the uncharged offenses.

The court must instruct the jury on what issue the evidence has been admitted to prove and delete reference to all other potential theories of relevance. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 949 [140 Cal.Rptr. 5]; *People v. Simon* (1986) 184 Cal.App.3d 125, 131 [228 Cal.Rptr. 855].) Select the appropriate grounds from options A through H and delete all grounds that do not apply.

When giving option F, the court may give the bracketed "or scheme" at its discretion, if relevant.

The court may give the bracketed sentence that begins with "In evaluating this evidence" at its discretion when instructing on evidence of uncharged offenses that has been admitted based on similarity to the current offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].) For example, when the evidence of similar offenses is admitted to prove common plan, intent, or identity, this bracketed sentence would be appropriate.

Give the bracketed sentence beginning with "Do not conclude from this evidence that" on request if the evidence is admitted only under Evidence Code section 1101(b). Do not give this sentence if the court is also instructing under Evidence Code section 1108 or 1109.

The paragraph that begins with "If you conclude that the defendant committed" has been included to prevent jury confusion regarding the

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standard of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] [instruction on section 1108 evidence sufficient where it advised jury that prior offense alone not sufficient to convict; prosecution still required to prove all elements beyond a reasonable doubt].)

AUTHORITY

- Evidence Admissible for Limited Purposes. Evid. Code, § 1101(b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 422 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Degree of Similarity Required. *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Analysis Under Evidence Code Section 352 Required. *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements. *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Potential Conflict With Circumstantial Evidence Instruction. *People v. James* (2000) 81 Cal.App.4th 1343, 1358–1359 [96 Cal.Rptr.2d 823].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 74–95.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.12[1][c] (Matthew Bender).

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

Evidence of other offenses is circumstantial evidence that the defendant committed the offense charged. (See *People v. James* (2000) 81

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Cal.App.4th 1343, 1358, fn. 9 [96 Cal.Rptr.2d 823].) Courts have recognized a potential conflict between the preponderance standard required to prove uncharged offenses and the reasonable doubt standard required to prove each underlying fact when the case is based primarily on circumstantial evidence. (See *People v. Medina* (1995) 11 Cal.4th 694, 763–764 [47 Cal.Rptr.2d 165, 906 P.2d 2]; *People v. James, supra,* 81 Cal.App.4th at p. 1358, fn. 9.) The court must give the general circumstantial evidence instruction (CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*) "only when the prosecution relies on circumstantial evidence to prove the defendant's guilt from a pattern of incriminating circumstances, not when circumstantial evidence serves solely to corroborate direct evidence." (*People v. James, supra,* 81 Cal.App.4th at p. 1359.) Thus, if evidence of other offenses is offered to corroborate direct evidence that the defendant committed the crime, no conflict exists. However, when the prosecution's case rests substantially or entirely on circumstantial evidence, there will be a conflict between this instruction and CALCRIM No. 223. (*People v. James, supra,* 81 Cal.App.4th at p. 1358, fn. 9; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382, fn. 4; *People v. Jeffries* (2000) 83 Cal.App.4th 15, 23–24, fn. 7.) No case has determined how this conflict should be resolved. If this issue arises in a particular case, the court should consider the authorities cited and determine whether it is necessary to modify this instruction. (*People v. Younger, supra,* 84 Cal.App.4th at p. 1382, fn. 4; *People v. Jeffries, supra,* 83 Cal.App.4th at p. 24, fn. 7.)

Issue in Dispute

The "defendant's plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The defense may seek to "narrow the prosecution's burden of proof" by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106 [256 Cal.Rptr. 647].) "[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Scheid* (1997) 16 Cal.4th 1, 16–17 [65 Cal.Rptr.2d 348, 939 P.2d 748].) However, an offer to stipulate may make the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [101

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Cal.Rptr.2d 825] [observing that offer "not to argue" the issue is insufficient].) The court must also consider whether there could be a "reasonable dispute" about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423 [27 Cal.Rptr.2d 666, 867 P.2d 777] [evidence of other offense not admissible to show intent to rape because if jury believed witness's account, intent could not reasonably be disputed]; *People v. Bruce, supra,* 208 Cal.App.3d at pp. 1103–1106 [same].)

Subsequent Offenses Admissible

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 425 [27 Cal.Rptr.2d 666, 867 P.2d 777].)

Offenses Not Connected to Defendant

Evidence of other offenses committed in the same manner as the alleged offense is not admissible unless there is sufficient evidence that the defendant committed the uncharged offenses. (*People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006–1007 [12 Cal.Rptr.2d 838] [evidence of how auto-theft rings operate inadmissible]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 242 [63 Cal.Rptr.2d 769] [evidence from police database of similar sexual offenses committed by unknown assailant inadmissible].)

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376. Possession of Recently Stolen Property as Evidence of a Crime

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If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of _____ <*insert crime*> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____ <*insert crime*>.

The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove (his/her) guilt of _____ <*insert crime*>.

[You may also consider whether _____ <*insert other appropriate factors for consideration*>.]

Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.

BENCH NOTES

Instructional Duty

The instruction should be given **sua sponte** if there is evidence of possession of stolen property and corroborating evidence of guilt. (See *People v. Clark* (1953) 122 Cal.App.2d 342, 346 [265 P.2d 43] [failure to instruct that unexplained possession alone does not support finding of guilt was error]; *People v. Smith* (1950) 98 Cal.App.2d 723, 730 [221 P.2d 140].)

The instruction may be given when the charged crime is robbery, burglary, theft, or receiving stolen property. (See *People v. McFarland* (1962) 58 Cal.2d 748, 755 [26 Cal.Rptr. 473, 376 P.2d 449] [burglary and theft]; *People v. Johnson* (1993) 6 Cal.4th 1, 36–37 [23 Cal.Rptr.2d 593, 859 P.2d 673] [burglary]; *People v. Gamble* (1994) 22 Cal.App.4th 446, 453

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[27 Cal.Rptr.2d 451] [robbery]; *People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [258 Cal.Rptr. 482] [receiving stolen property].) The crime of receiving stolen property includes receiving property that was obtained by extortion (Pen. Code, § 496). Thus, the instruction also includes optional language for recently extorted property.

Use of this instruction should be limited to theft and theft-related crimes. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1176 [111 Cal.Rptr.2d 403] [disapproving use of instruction to infer guilt of murder]; but see *People v. Harden* (2003) 110 Cal.App.4th 848, 856 [2 Cal.Rptr.3d 105] [court did not err in giving modified instruction on possession of recently stolen property in relation to special circumstance of murder committed during robbery]; *People v. Smithey* (1999) 20 Cal.4th 936, 975–978 [86 Cal.Rptr.2d 243, 978 P.2d 1171] [in a case involving both premeditated and felony murder, no error in instructing on underlying crimes of robbery and burglary]; *People v. Mendoza* (2000) 24 Cal.4th 130, 176–177 [99 Cal.Rptr.2d 485, 6 P.3d 150].)

Corroborating Evidence

The bracketed paragraph that begins with "You may also consider" may be used if the court grants a request for instruction on specific examples of corroboration supported by the evidence. (See *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [8 P.2d 209] [list of examples]; see also *People v. Peters* (1982) 128 Cal.App.3d 75, 85–86 [180 Cal.Rptr. 76] [reference to false or contradictory statement improper when no such evidence was introduced]). Examples include the following:

a. False, contradictory, or inconsistent statements. (*People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [258 Cal.Rptr. 482]; see, e.g., *People v. Peete* (1921) 54 Cal.App. 333, 345–346 [202 P. 51] [false statement showing consciousness of guilt]; *People v. Lang* (1989) 49 Cal.3d 991, 1024–1025 [264 Cal.Rptr. 386, 782 P.2d 627] [false explanation for possession of property]; *People v. Farrell* (1924) 67 Cal.App. 128, 133–134 [227 P. 210] [same].)

b. The attributes of possession, e.g., the time, place, and manner of possession that tend to show guilt. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 424; *People v. Hallman* (1973) 35 Cal.App.3d 638, 641 [110 Cal.Rptr. 891]; see, e.g., *People v. Gamble* (1994) 22 Cal.App.4th 446, 453–454 [27 Cal.Rptr.2d 451].)

c. The opportunity to commit the crime. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 425; *People v. Mosqueira* (1970) 12 Cal.App.3d 1173, 1176 [91 Cal.Rptr. 370].)

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d. The defendant's conduct or statements tending to show guilt, or the failure to explain possession of the property under circumstances that indicate a "consciousness of guilt." (*People v. Citrino* (1956) 46 Cal.2d 284, 288–289 [294 P.2d 32]; *People v. Wells* (1960) 187 Cal.App.2d 324, 328–329, 331–332 [9 Cal.Rptr. 384]; *People v. Mendoza* (2000) 24 Cal.4th 130, 175–176 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Champion* (1968) 265 Cal.App.2d 29, 32 [71 Cal.Rptr. 113].)

e. Flight after arrest. (*People v. Scott* (1924) 66 Cal.App. 200, 203 [225 P. 767]; *People v. Wells, supra,* 187 Cal.App.2d at p.329.)

f. Assuming a false name and being unable to find the person from whom the defendant claimed to have received the property. (*People v. Cox* (1916) 29 Cal.App. 419, 422 [155 P. 1010].)

g. Sale of property under a false name and at an inadequate price. (*People v. Majors* (1920) 47 Cal.App. 374, 375 [190 P. 636].)

h. Sale of property with identity marks removed (*People v. Miller* (1920) 45 Cal.App. 494, 496–497 [188 P. 52]) or removal of serial numbers (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1401 [34 Cal.Rptr.2d 324]).

i. Modification of the property. (*People v. Esquivel, supra,* 28 Cal.App.4th at p. 1401 [shortening barrels of shotguns].)

j. Attempting to throw away the property. (*People v. Crotty* (1925) 70 Cal.App. 515, 518–519 [233 P. 395].)

AUTHORITY

- Instructional Requirements. People v. Williams (2000) 79 Cal.App.4th 1157, 1172 [94 Cal.Rptr.2d 727]; see *People v. McFarland* (1962) 58 Cal.2d 748, 755 [26 Cal.Rptr. 473, 376 P.2d 449].
- Corroboration Defined. See Pen. Code, § 1111; *People v. McFarland* (1962) 58 Cal.2d 748, 754–755 [26 Cal.Rptr. 473, 376 P.2d 449].
- Due Process Requirements for Permissive Inferences. *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 165 [99 S.Ct. 2213, 60 L.Ed.2d 777]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172; *People v. Gamble* (1994) 22 Cal.App.4th 446, 454–455 [27 Cal.Rptr.2d 451].
- Examples of Corroborative Evidence. *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [8 P.2d 209].

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- Recently Stolen. *People v. Anderson* (1989) 210 Cal.App.3d 414, 421–422 [258 Cal.Rptr. 482]; *People v. Lopez* (1954) 126 Cal.App.2d 274, 278 [271 P.2d 874].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 13 [in context of larceny]; § 82 [in context of receiving stolen property]; § 86 [in context of robbery]; § 135 [in context of burglary].

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 526 [presumptions].

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 62; Circumstantial Evidence, § 129.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

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AIDING AND ABETTING, INCHOATE, AND ACCESSORIAL CRIMES

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A. AIDING AND ABETTING AND RELATED DOCTRINES

400. Aiding and Abetting: General Principles

A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. Two, he or she may have aided and abetted someone else, who committed the crime. In these instructions, I will call that other person the "perpetrator." A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.

[Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

When the prosecution is relying on aiding and abetting, give this instruction before other instructions on aiding and abetting to introduce this theory of culpability to the jury.

If the prosecution is also relying on the natural and probable consequences doctrine, the court should also instruct with the last bracketed paragraph. Depending on which theories are relied on by the prosecution, the court should then instruct as follows.

Intended Crimes (Target Crimes)

If the prosecution's theory is that the defendant intended to aid and abet the crime or crimes charged (target crimes), give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes.*

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Natural & Probable Consequences Doctrine (Non-Target Crimes)

If the prosecution's theory is that any of the crimes charged were committed as a natural and probable consequence of the target crime, CALCRIM No. 402 or 403 should also be given. If both the target and non-target crimes are charged, give CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*. In some cases, the prosecution may not charge the target crime but only the non-target crime. In that case, give CALCRIM No. 403, *Natural and Probable Consequences (Only Non-Target Offense Charged)*.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, § 78.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10 (Matthew Bender).

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401. Aiding and Abetting: Intended Crimes

To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

1. **The perpetrator committed the crime;**
2. **The defendant knew that the perpetrator intended to commit the crime;**
3. **Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.**

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime.**

AND

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2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with "If you conclude that defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is evidence that the defendant withdrew from participation in the crime, the court has a **sua sponte** duty to give the bracketed portion regarding withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].)

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, before this instruction. Note that Penal Code section 30 uses "principal" but that CALCRIM Nos. 400 and 401 substitute "perpetrator" for clarity.

If the prosecution charges non-target crimes under the Natural and Probable Consequences Doctrine, give CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*, if both non-target and target crimes have been charged. Give CALCRIM No. 403, *Natural and Probable Consequences (Only Non-Target Offense Charged)*, if only the non-target crimes have been charged.

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If the defendant is charged with aiding and abetting robbery and there is an issue as to when intent to aid and abet was formed, give CALCRIM No. 1603, *Robbery: Intent of Aider and Abettor*.

If the defendant is charged with aiding and abetting burglary and there is an issue as to when intent to aid and abet was formed, give CALCRIM No. 1702, *Burglary: Intent of Aider and Abettor*.

AUTHORITY

- Definition of Principals. Pen. Code, § 31.
- Parties to Crime. Pen. Code, § 30.
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Requirements for Aiding and Abetting. *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Withdrawal. *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, § 78.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

RELATED ISSUES

Perpetrator versus Aider and Abettor

For purposes of culpability the law does not distinguish between perpetrators and aiders and abettors; however, the required mental states that must be proved for each are different. One who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor of the crime. (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1371 [72 Cal.Rptr.2d 183].)

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Accessory After the Fact

The prosecution must show that an aider and abettor intended to facilitate or encourage the target offense before or during its commission. If the defendant formed an intent to aid after the crime was completed, then he or she may be liable as an accessory after the fact. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1160–1161 [282 Cal.Rptr. 450, 811 P.2d 742] [get-away driver, whose intent to aid was formed after asportation of property, was an accessory after the fact, not an aider and abettor]; *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069, 1072–1073 [126 Cal.Rptr. 104]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 760–761 [230 Cal.Rptr. 667, 726 P.2d 113].)

Factors Relevant to Aiding and Abetting

Factors relevant to determining whether a person is an aider and abettor include: presence at the scene of the crime, companionship, and conduct before or after the offense. (*People v. Singleton* (1987) 196 Cal.App.3d 488, 492 [241 Cal.Rptr. 842] [citing *People v. Chagolla* (1983) 144 Cal.App.3d 422, 429 [193 Cal.Rptr. 711]]; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [30 Cal.Rptr.2d 525].)

Presence Not Required

A person may aid and abet a crime without being physically present. (*People v. Bohmer* (1975) 46 Cal.App.3d 185, 199 [120 Cal.Rptr. 136]; see also *People v. Sarkis* (1990) 222 Cal.App.3d 23, 27 [272 Cal.Rptr. 34].) Nor does a person have to physically assist in the commission of the crime; a person may be guilty of aiding and abetting if he or she intends the crime to be committed and instigates or encourages the perpetrator to commit it. (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1256 [56 Cal.Rptr.2d 202].)

Principal Acquitted or Convicted of Lesser Offense

Although the jury must find that the principal committed the crime aided and abetted, the fact that a principal has been acquitted of a crime or convicted of a lesser offense in a separate proceeding does not bar conviction of an aider and abettor. (*People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1092–1094 [31 Cal.Rptr.2d 764]; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1066–1069 [40 Cal.Rptr.2d 683]; *People v. Rose* (1997) 56 Cal.App.4th 990 [65 Cal.Rptr.2d 887].) A single Supreme Court case has created an exception to this principle and held that non-mutual collateral estoppel bars conviction of an aider and abettor when the

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principal was acquitted in a separate proceeding. (*People v. Taylor* (1974) 12 Cal.3d 686, 696–698 [117 Cal.Rptr.70, 527 P.2d 622].) In *Taylor*, the defendant was the "get-away driver" in a liquor store robbery in which one of the perpetrators inadvertently killed another during a gun battle inside the store. In a separate trial, the gunman was acquitted of the murder of his co-perpetrator because the jury did not find malice. The court held that collateral estoppel barred conviction of the aiding and abetting driver, reasoning that the policy considerations favoring application of collateral estoppel were served in the case. The court specifically limited its holding to the facts, emphasizing the clear identity of issues involved and the need to prevent inconsistent verdicts. (See also *People v. Howard* (1988) 44 Cal.3d 375, 411–414 [243 Cal.Rptr. 842, 749 P.2d 279] [court rejected collateral estoppel argument and reiterated the limited nature of its holding in *Taylor*].)

Specific Intent Crimes

If a specific intent crime is aided and abetted, the aider and abettor must share the requisite specific intent with the perpetrator. "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560 [199 Cal.Rptr. 60, 674 P.2d 1318] [citations omitted].) The perpetrator must have the requisite specific intent and the jury must be so instructed. (*People v. Patterson* (1989) 209 Cal.App.3d 610 [257 Cal.Rptr. 407] [trial court erred in failing to instruct jury that perpetrator must have specific intent to kill]; *People v. Torres* (1990) 224 Cal.App.3d 763, 768–769 [274 Cal.Rptr. 117].) And the jury must find that the aider and abettor shared the perpetrator's specific intent. (*People v. Acero* (1984) 161 Cal.App.3d 217, 224 [208 Cal.Rptr. 565] [to convict defendant of aiding and abetting and attempted murder, jury must find that he shared perpetrator's specific intent to kill].)

Greater Guilt Than Actual Killer

An aider and abettor may be guilty of greater homicide-related crimes than the actual killer. When a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other is deemed

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the actual killer. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1121 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

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402. Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)

The defendant is charged in Count[s] ____ with _____ <*insert target offense*> and in Counts[s] ____ with _____ <*insert non-target offense*>.

You must first decide whether the defendant is guilty of _____ <*insert target offense*>. If you find the defendant is guilty of this crime, you must then decide whether (he/she) is guilty of _____ <*insert non-target offense*>.

Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

To prove that the defendant is guilty of _____ <*insert non-target offense*>, the People must prove that:

1. **The defendant is guilty of _____ <*insert target offense*>;**
2. **During the commission of the _____ <*insert target offense*>, the crime of _____ <*insert non-target offense*> was committed;**

AND

3. **Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of _____ <*insert non-target offense*> was a natural and probable consequence of the commission of the _____ <*insert target offense*>.**

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the _____ <*insert non-target offense*> was committed for a reason independent of the common plan to commit the _____ <*insert target offense*>, then the commission of _____ <*insert non-target offense*> was not a natural and probable consequence of _____ <*insert target offense*>.

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To decide whether the crime of _____ <*insert non-target offense*> was committed, please refer to the separate instructions that I (will give/have given) you on that crime.

[The People allege that the defendant originally intended to aid and abet the commission of either _____ <*insert target offense*> or _____ <*insert alternative target offense*>. The defendant is guilty of _____ <*insert non-target offense*> if the People have proved that the defendant aided and abetted either _____ <*insert target offense*> or _____ <*insert alternative target offense*> and that _____ <*insert non-target offense*> was the natural and probable consequence of either _____ <*insert target offense*> or _____ <*insert alternative target offense*>. However, you do not need to agree on which of these two crimes the defendant aided and abetted.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on that theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

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This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges both target and non-target crimes. If only non-target crimes are charged, give CALCRIM No. 403.

AUTHORITY

- Aiding and Abetting Defined. *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard. *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

COMMENTARY

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define "natural and probable."])

RELATED ISSUES

Lesser Included Offenses

The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the

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evidence raises a question whether the greater offense is a natural and probable consequence of the original, intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586–1588 [11 Cal.Rptr.2d 231] [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

Specific Intent—Non-Target Crimes

Before an aider and abettor may be found guilty of a specific intent crime under the natural and probable consequences doctrine, the jury must first find that the perpetrator possessed the required specific intent. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 614 [257 Cal.Rptr. 407] [trial court erroneously failed to instruct the jury that they must find that the perpetrator had the specific intent to kill necessary for attempted murder before they could find the defendant guilty as an aider and abettor under the "natural and probable" consequences doctrine], disagreeing with *People v. Hammond* (1986) 181 Cal.App.3d 463 [226 Cal.Rptr. 475] to the extent it held otherwise.) However, it is not necessary that the jury find that the aider and abettor had the specific intent; the jury must only determine that the specific intent crime was a natural and probable consequence of the original crime aided and abetted. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586–1587 [11 Cal.Rptr. 2d 231].)

Target and Non-Target Offense May Consist of Same Act

Although generally, non-target offenses charged under the natural and probable consequences doctrine will be different and typically more serious criminal acts than the target offense alleged, they may consist of the same act with differing mental states. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463–1466 [61 Cal.Rptr.2d 680] [defendants were properly convicted of attempted murder as a natural and probable consequence of aiding and abetting the discharge of a firearm from a vehicle. Although both crimes consist of the same act, attempted murder requires a more culpable mental state].)

Target Offense Not Committed

The Supreme Court has left open the question whether a person may be liable under the natural and probable consequences doctrine for a non-target offense, if the target offense was not committed. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. 4 [58 Cal.Rptr.2d 827, 926 P.2d 1013].)

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See generally, the related issues under CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

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403. Natural and Probable Consequences (Only Non-Target Offense Charged)

[Before you may decide whether the defendant is guilty of _____ <*insert non-target offense*>**, you must decide whether (he/she) is guilty of** _____ <*insert target offense*>**.]**

To prove that the defendant is guilty of _____ <*insert non-target offense*>**, the People must prove that:**

1. **The defendant is guilty of** _____ <*insert target offense*>**;**
2. **During the commission of the** _____ <*insert target offense*>, **the crime of** _____ <*insert non-target offense*> **was committed;**

AND

3. **Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the** _____ <*insert non-target offense*> **was a natural and probable consequence of the commission of the** _____ <*insert target offense*>**.**

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the _____ <*insert non-target offense*> **was committed for a reason independent of the common plan to commit the** _____ <*insert target offense*>**, then the commission of** _____ <*insert non-target offense*> **was not a natural and probable consequence of** _____ <*insert target offense*>**.**

To decide whether crime of _____ <*insert non-target offense*> **was committed, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

[The People are alleging that the defendant originally intended to aid and abet either _____ <*insert target offense*> **or** _____ <*insert alternative target offense*>**.**

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The defendant is guilty of _____ <*insert non-target offense*> if you decide that the defendant aided and abetted one of these crimes and that _____ <*insert non-target offense*> was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Do not give the first bracketed paragraph in cases in which the prosecution is also pursuing a conspiracy theory.

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges only non-target crimes. If both target and non-target crimes are charged, give CALCRIM No. 402.

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AUTHORITY

- Aiding and Abetting Defined. *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard. *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- No Unanimity Required. *People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr.2d 827, 926 P.2d 1013].
- Withdrawal. *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 1013]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

COMMENTARY

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define "natural and probable."])

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RELATED ISSUES

See the Related Issues section under CALCRIM No. 401, *Aiding and Abetting*, and CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged).*

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404. Intoxication

If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant:

A. Knew that _____ <*insert name of perpetrator*> **intended to commit** _____ <*insert target offense*>**;**

AND

B. Intended to aid and abet _____ <*insert name of perpetrator*> **in committing** _____ <*insert target offense*>**.**

Someone is *intoxicated* if he or she (took[,]/ [or] used[,]/[or] was given) any drug, drink, or other substance that caused an intoxicating effect.

[Do not consider evidence of intoxication in deciding whether _____ <*insert charged nontarget offense*> **is a natural and probable consequence of** _____ <*insert target offense*>**.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [in context not involving aiding and abetting].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary or involuntary intoxication and its effect on a defendant's ability to form specific mental states. (Pen. Code, §§ 22, 26; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735]; *People v. Scott* (1983) 146 Cal.App.3d 823, 832 [194 Cal.Rptr. 633].)

Give the last bracketed paragraph on request if the defendant was charged with both target and nontarget crimes. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

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Related Instructions

See CALCRIM No. 3426, *Voluntary Intoxication*, and CALCRIM No. 3427, *Involuntary Intoxication*.

AUTHORITY

- Instructional Requirements. Pen. Code, § 22; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735]; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [in context other than aiding and abetting].
- Burden of Proof. See *People v. Saille* (1991) 54 Cal.3d 1103, 1118–1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [in context other than aiding and abetting].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 26–30.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3][c] (Matthew Bender).

RELATED ISSUES

Intoxication Based on Mistake of Fact Is Involuntary

Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [194 Cal.Rptr. 633] [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26, and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to

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instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime].)

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B. CONSPIRACY

415. Conspiracy

[I have explained that (the/a) defendant may be guilty of a crime if (he/she) either commits the crime or aids and abets the crime. (He/She) may also be guilty if (he/she) is a member of a conspiracy.]

(The defendant[s]/Defendant[s] _____ <*insert name[s]*>) **(is/are) charged [in Count ____] with conspiracy to commit** _____ <*insert alleged crime[s]*>**.**

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

1. **The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or]** _____ <*insert name[s] or description[s] of coparticipant[s]*>**) to commit** _____ <*insert alleged crime[s]*>**;**
2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit** _____ <*insert alleged crime[s]*>**;**
3. **(The/One of the) defendant[s][,] [or** _____ <*insert name[s] or description[s] of coparticipant[s]*>**][,] [or (both/all) of them] committed [at least one of] the following alleged overt act[s] to accomplish** _____ <*insert alleged crime[s]*>**:** _____ <*insert the alleged overt acts*>**;**

AND

4. **[At least one of these/This] overt act[s] was committed in California placeholder.**

To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the act[s].

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit _____ <*insert alleged crime[s]*>**, please refer to the separate**

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instructions that I (will give/have given) you on (that/those) crime[s].

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit _____ <*insert alleged crime[s]*>. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime[s].

An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]

[The People allege that the defendant[s] conspired to commit the following crimes: _____ <*insert alleged crime[s]*>. You may not find (the/a) defendant guilty of conspiracy unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that

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helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) If the defendant is charged with conspiracy to commit murder, do not give this instruction. Give CALCRIM No. 563, *Conspiracy to Commit Murder*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give this instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if "the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . . ." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) A unanimity instruction is not required if there is "merely possible uncertainty on how the defendant is guilty of a particular conspiracy." (*People v. Russo, supra,* 25 Cal.4th at p. 1135.) Thus, the jury need not unanimously agree as to what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra*, 25 Cal.4th at pp. 1135–1136.) However, it appears that a unanimity instruction is required when the prosecution alleges multiple crimes that may have been the target of the conspiracy. (See *People v. Diedrich, supra,* 31 Cal.3d at pp. 285–286 [approving of unanimity instruction as to crime that was target of conspiracy]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210] [not error to decline to give unanimity instruction; if was error, harmless].) Give the bracketed paragraph that begins, "The People alleged that the defendant[s] conspired

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to commit the following crimes," if multiple crimes are alleged as target offenses of the conspiracy. Give the bracketed sentence regarding the degree of the crime if any target felony has different punishments for different degrees. (See Pen. Code, § 182(a).) The court must also give the jury a verdict form on which it can state the specific crime or crimes that the jury unanimously agrees the defendant conspired to commit.

In addition, if a conspiracy case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*People v. Russo, supra,* 25 Cal.4th at p. 1136, fn. 2; see also Related Issues section below on statute of limitations.)

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with "You must make a separate decision," if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [288 P.2d 307].)

Give the bracketed sentence that begins with "A member of a conspiracy does not have to personally know," on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal From Conspiracy*.

AUTHORITY

- Elements. Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 655, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].

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- Overt Act Defined. Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy. *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].
- Elements of Underlying Offense. *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].
- Two Specific Intents. *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other ground in People v. Cortez (1998) 18 Cal.4th 1223, 1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Unanimity on Specific Overt Act Not Required. *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Unanimity on Target Offenses of Single Conspiracy. *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 68–97.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][i], 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02, 141.10 (Matthew Bender).

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as "persons unknown." (*People v. Sacramento Butchers' Protective Ass'n*

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(1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

LESSER INCLUDED OFFENSES

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297 [115 Cal.Rptr. 516, 524 P.2d 1300], disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Cook* (2001) 91 Cal.App.4th 910, 918 [111 Cal.Rptr.2d 204]; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1370 [269 Cal.Rptr. 900]. Alternatively, the court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra,* 91 Cal.App.4th at pp. 919–920, 922; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [54 Cal.Rptr.2d 608] [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

RELATED ISSUES

Acquittal of Coconspirators

The "rule of consistency" has been abandoned in conspiracy cases. The acquittal of all alleged conspirators but one does not require the acquittal of the remaining alleged conspirator. (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 864–865 [103 Cal.Rptr.2d 13, 15 P.3d 234].)

Conspiracy to Collect Insurance Proceeds

A conspiracy to commit a particular offense does not necessarily include a conspiracy to collect insurance proceeds. (*People v. Leach* (1975) 15 Cal.3d 419, 435 [124 Cal.Rptr. 752, 541 P.2d 296].)

Death of Coconspirator

A surviving conspirator is liable for proceeding with an overt act after the death of his or her coconspirator. (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1262 [98 Cal.Rptr.2d 737.)

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Factual Impossibility

Factual impossibility of accomplishing a substantive crime is not a defense to conspiracy to commit that crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1130–1131 [54 Cal.Rptr.2d 578]; see also *United States v. Jimenez Recio* (2003) 537 U.S. 270, 274–275 [123 S.Ct. 819, 154 L.Ed.2d 744] [rejecting the rule that a conspiracy ends when the object of the conspiracy is defeated].)

Statute of Limitations

The defendant may assert the statute of limitations defense for any felony that is the primary object of the conspiracy. The limitations period begins to run with the last overt act committed in furtherance of the conspiracy. (*Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 410 [173 Cal.Rptr. 906]; *People v. Crosby* (1962) 58 Cal.2d 713, 728 [25 Cal.Rptr. 847, 375 P.2d 839]; see Pen. Code, §§ 800, 801.) If the substantive offense that is the primary object of the conspiracy is successfully attained, the statute begins to run at the same time as for the substantive offense. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [134 Cal.Rptr. 784, 557 P.2d 75].) "[I]f there is a question regarding the statute of limitations, the court may have to require the jury to agree an overt act was committed within the limitations period." (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641] [dicta].) See generally CALCRIM No. 3410, *Statute of Limitations* and CALCRIM No. 3500, *Unanimity*.

Supplier of Goods or Services

A supplier of lawful goods or services put to an unlawful use is not liable for criminal conspiracy unless he or she both knows of the illegal use of the goods or services and intends to further that use. The latter intent may be established by direct evidence of the supplier's intent to participate, or by inference based on the supplier's special interest in the activity or the aggravated nature of the crime itself. (*People v. Lauria* (1967) 251 Cal.App.2d 471, 476–477, 482 [59 Cal.Rptr. 628].)

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Wharton's Rule

If the cooperation of two or more persons is necessary to commit a substantive crime, and there is no element of an alleged conspiracy that is not present in the substantive crime, then the persons involved cannot be charged with both the substantive crime and conspiracy to commit the substantive crime. (*People v. Mayers* (1980) 110 Cal.App.3d 809, 815 [168 Cal.Rptr. 252] [known as Wharton's Rule or "concert of action" rule].)

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416. Evidence of Uncharged Conspiracy

The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.

To prove that (the/a) defendant was a member of a conspiracy in this case, the People must prove that:

1. **The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] _____ <*insert name[s] or description[s] of coparticipant[s]*>) to commit _____ <*insert alleged crime[s]*>;**
2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit _____ <*insert alleged crime[s]*>;**
3. **(The/One of the) defendant[s][,] [or _____ <*insert name[s] or description[s] of coparticipant[s]*>][,] [or (both/ all) of them] committed [at least one of] the following overt act[s] to accomplish _____ <*insert alleged crime[s]*>: _____ <*insert the alleged overt acts*>;**

AND

4. **[At least one of these/This] overt act[s] was committed in California.**

To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the act[s].

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit _____<*insert alleged crime[s]*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit _____ <*insert alleged crime[s]*>. The People do not have to prove that any of the members of the alleged conspiracy actually met or

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came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must decide as to each defendant whether he or she was a member of the alleged conspiracy.]

[The People contend that the defendant[s] conspired to commit one of the following crimes: _____ <*insert alleged crime[s]*>. You may not find (the/a) defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the prosecution has not charged the crime of conspiracy but has introduced evidence of a conspiracy to prove liability for other offenses or to introduce hearsay statements of coconspirators. (See, e.g., *People v. Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656]; *People v. Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714].)

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if "the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . . ." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) See the Bench Notes to CALCRIM No. 415, *Conspiracy*, on when the court is required to give a unanimity instruction.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section to CALCRIM No. 415, *Conspiracy*.

Give the bracketed sentence that begins with "You must make a separate decision," if the prosecution alleges that more than one defendant was a member of the conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with "A member of a conspiracy does not have to personally know," on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

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Defenses—Instructional Duty

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal from Conspiracy*.

Related Instructions

CALCRIM No. 417, *Liability for Coconspirators' Acts*.

CALCRIM No. 418, *Coconspirator's Statements*.

CALCRIM No. 419, *Acts Committed or Statements Made Before Joining Conspiracy*.

AUTHORITY

- Overt Act Defined. Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy. *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].
- Elements of Underlying Offense. *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Two Specific Intents. *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240 [77 Cal.Rptr.2d 733, 960 P.2d 537].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 68–97.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02 (Matthew Bender).

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RELATED ISSUES

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

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417. Liability for Coconspirators' Acts

A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime.

A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. [Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act.]

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan.

To prove that the defendant is guilty of the crime[s] charged in Count[s] ____, the People must prove that:

1. **The defendant conspired to commit one of the following crimes: _____ <*insert target crime[s]*>;**
2. **A member of the conspiracy committed _____ <*insert nontarget offense[s]*> to further the conspiracy;**

AND

3. **_____ <*insert nontarget offense[s]*> (was/were) [a] natural and probable consequence[s] of the common plan or design of the crime that the defendant conspired to commit.**

[The defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy.]

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[A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy had been accomplished.]

BENCH NOTES

Instructional Duty

Give this instruction when there is an issue whether the defendant is liable for the acts of coconspirators. (See *People v. Flores* (1992) 7 Cal.App.4th 1350, 1363 [9 Cal.Rptr.2d 754] [no sua sponte duty when no issue of independent criminal act by coconspirator].)

The court **must** also give either CALCRIM No. 415, *Conspiracy*, or CALCRIM No. 416, *Evidence of Uncharged Conspiracy*, with this instruction. The court **must** also give all appropriate instructions on the offense or offenses alleged to be the target of the conspiracy. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254 [58 Cal.Rptr.2d 827, 926 P.2d 1013.)

Give the bracketed sentence that begins with "Under this rule," if there is evidence that the defendant was not present at the time of the act. (See *People v. Benenato* (1946) 77 Cal.App.2d 350, 356 [175 P.2d 296]; *People v. King* (1938) 30 Cal.App.2d 185, 203 [85 P.2d 928].)

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, a suggested definition is included. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 291 [58 Cal.Rptr.2d 827, 926 P.2d 1013] (conc. & dis. opn. of Brown, J.).)

Give either of the last two bracketed paragraphs on request, when supported by the evidence.

Related Instructions

CALCRIM No. 418, *Coconspirator's Statements*.

AUTHORITY

- Natural and Probable Consequences; Reasonable Person Standard. *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388]; see *People v. Nguyen* (1993) 21

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Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323] [in context of aiding and abetting].

- Vicarious Liability of Conspirators. *People v. Hardy* (1992) 2 Cal.4th 86, 188 [5 Cal.Rptr.2d 796, 825 P.2d 781].
- Must Identify and Describe Target Offense. *People v. Prettyman* (1996) 14 Cal.4th 248, 254 [58 Cal.Rptr.2d 827, 926 P.2d 1013].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 93–94.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[6], 141.02 (Matthew Bender).

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418. Coconspirator's Statements

In deciding whether the People have proved that (the defendant[s]/Defendant[s] _____ <*insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants; see Bench Notes*>**) committed [any of] the crime[s] charged, you may not consider any statement made out of court by** _____ <*insert name[s] of coconspirator[s]*> **unless the People have proved by a preponderance of the evidence that:**

1. **Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;**
2. _____ <*insert name[s] of coconspirator[s]*> **(was/were) members of and participating in the conspiracy when (he/she/they) made the statement;**
3. _____ <*insert name[s] of coconspirator[s]*> **made the statement in order to further the goal of the conspiracy;**

AND

4. **The statement was made before or during the time that (the defendant[s]/Defendant[s]** _____ <*insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants*>**) (was/were) participating in the conspiracy.**

A *statement* means an oral or written expression, or nonverbal conduct intended to be a substitute for an oral or written expression.

***Proof by a preponderance of the evidence* is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.**

[You may not consider statements made by a person who was not a member of the conspiracy even if the statements helped accomplish the goal of the conspiracy.]

[You may not consider statements made after the goal of the conspiracy had been accomplished.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant if the statement has been admitted under Evidence Code section 1223. (See *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911].)

The court **must also** give either CALCRIM No. 415, *Conspiracy*, or CALCRIM No. 416, *Evidence of Uncharged Conspiracy*, with this instruction.

If the coconspirator statement has been admitted against all defendants on trial, then use "the defendant[s]" in the first sentence and in element 4. If the coconspirator statement has been admitted under Evidence Code section 1223 against only one or some of the defendants on trial, insert the names of the defendants to whom this instruction applies where indicated. For example, if the prosecution is relying on a statement made by a defendant in the trial, the statement may be used against that defendant as an admission. However, as to the other defendants, the statement may be used only if it qualifies under Evidence Code section 1223 or another hearsay exception. In such cases, insert the names of the other codefendants where indicated in the first sentence and in element 4.

Give either of the last two bracketed paragraphs on request, when supported by the evidence.

AUTHORITY

- Hearsay Exception for Coconspirator's Statements. Evid. Code, § 1223; *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Lipinski* (1976) 65 Cal.App.3d 566, 575 [135 Cal.Rptr. 451].
- Statement Defined. Evid. Code, § 225.
- Burden of Proof. *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911].
- Independent Evidence Conspiracy Existed at Time of Statement. *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10, 436 [124 Cal.Rptr. 752, 541 P.2d 296].

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Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 134.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[5], 141.02 (Matthew Bender).

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419. Acts Committed or Statements Made Before Joining Conspiracy

(The/A) defendant is not responsible for any acts that were done before (he/ [or] she) joined the conspiracy.

You may consider evidence of acts or statements made before the defendant joined the conspiracy only to show the nature and goals of the conspiracy. You may not consider any such evidence to prove that the defendant is guilty of any crimes committed before (he/ [or] she) joined the conspiracy.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is evidence suggesting that the defendant joined an alleged conspiracy after the crime was committed or after an act or statement was made to further the object of the conspiracy.

AUTHORITY

- Joining Conspiracy After Commission of Crime. *People v. Marks* (1988) 45 Cal.3d 1335, 1345 [248 Cal.Rptr. 874, 756 P.2d 260]; *People v. Feldman* (1959) 171 Cal.App.2d 15, 21–22 [339 P.2d 888].
- Use of Prior Acts or Statements. *People v. Weiss* (1958) 50 Cal.2d 535, 564–566 [327 P.2d 527].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 95–96.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[6] (Matthew Bender).

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420. Withdrawal From Conspiracy

The defendant is not guilty of conspiracy to commit _____ <*insert target offense*> if (he/she) withdrew from the alleged conspiracy before any overt act was committed. To withdraw from a conspiracy, the defendant must truly and affirmatively reject the conspiracy and communicate that rejection, by word or by deed, to the other members of the conspiracy known to the defendant.

[A failure to act is not sufficient alone to withdraw from a conspiracy.]

[If you decide that the defendant withdrew from a conspiracy after an overt act was committed, the defendant is not guilty of any acts committed by remaining members of the conspiracy after (he/she) withdrew.]

<Alternative A—reasonable doubt standard>

[The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw from the conspiracy [before an overt act was committed]. If the People have not met this burden, you must find the defendant not guilty of conspiracy. [If the People have not met this burden, you must also find the defendant not guilty of the additional acts committed after (he/she) withdrew.]]

<Alternative B—preponderance standard>

[The defendant has the burden of proving by a preponderance of the evidence that (he/she) withdrew from the conspiracy [before an overt act was committed]. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is evidence that the defendant attempted to withdraw from the conspiracy.

There is no authority as to whether the defense must prove withdrawal by a preponderance of the evidence or whether the prosecution must prove beyond a reasonable doubt that the defense is not established. The court must instruct as to which party bears the burden. (*People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) The committee has provided the court with both options. The committee recommends reviewing *People v. Mower, supra,* 28 Cal.4th at pp. 478–479, discussing affirmative defenses and burdens of proof generally.

AUTHORITY

- Withdrawal From Conspiracy as Defense. *People v. Crosby* (1962) 58 Cal.2d 713, 731 [25 Cal.Rptr. 847, 375 P.2d 839].
- Ineffective Withdrawal. *People v. Sconce* (1991) 228 Cal.App.3d 693, 701 [279 Cal.Rptr. 59]; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003 [95 Cal.Rptr. 360].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[6], [7] (Matthew Bender).

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C. ACCESSORY AND SOLICITATION

440. Accessories

The defendant is charged [in Count ____] with being an accessory to a felony.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **Another person, whom I will call the perpetrator, committed a felony;**
2. **The defendant knew that the perpetrator had committed a felony or that the perpetrator had been charged with or convicted of a felony;**
3. **After the felony had been committed, the defendant either harbored, concealed, or aided the perpetrator;**

AND

4. **When the defendant acted, (he/she) intended that the perpetrator avoid or escape arrest, trial, conviction, or punishment.**

[To decide whether the perpetrator committed the (felony/felonies) of _____ <*insert offense[s]*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

There is no sua sponte duty to instruct on the underlying felony unless it is unclear that a felony occurred. However, the defendant is entitled to such an instruction on request. (*People v. Shields* (1990) 222 Cal.App.3d 1, 4–5 [271 Cal.Rptr. 228].)

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AUTHORITY

- Elements. Pen. Code, § 32; *People v. Duty* (1969) 269 Cal.App.2d 97, 100–101 [74 Cal.Rptr. 606].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 90, 91.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.11 (Matthew Bender).

COMMENTARY

There is no authority defining "harbor." The committee therefore kept "harbor" in the instruction. *Black's Law Dictionary* defines harbor as "[t]he act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien." (7th ed., 1999, at p. 721.) The court may wish to give an additional definition depending on the facts of the case.

RELATED ISSUES

Accessory and Principal to the Same Crime

There is a split of authority on whether a person may ever be guilty as an accessory and a principal to the same crime. Early case law held that it was not possible to be convicted of both because either logic or policy prohibited it. (*People v. Prado* (1977) 67 Cal.App.3d 267, 271–273 [136 Cal.Rptr. 521]; *People v. Francis* (1982) 129 Cal.App.3d 241, 246–253 [180 Cal.Rptr. 873].) However, a later case disagreed with both of these cases and held "that there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime." (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324 [19 Cal.Rptr.2d 423], disapproved on other grounds in *People v. Prettyman* (1996) 14 Cal.4th 248 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [25 Cal.Rptr.2d 676]; but see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536 [26 Cal.Rptr.2d 323] [suggesting in dicta that a person guilty as a principal can never be guilty as an accessory].)

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Awareness of the Commission of Other Crimes Insufficient to Establish Guilt as an Accessory

Awareness that a co-perpetrator has committed other crimes is not enough to find a person guilty as an accessory to those crimes unless there is evidence that the person intentionally did something to help the co-perpetrator avoid or escape arrest, trial, conviction or punishment for those offenses. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 537 [26 Cal.Rptr.2d 323] [defendants' convictions as accessories to sexual assaults committed by co-perpetrators in the course of a robbery reversed; no evidence existed that defendants did anything to help co-perpetrators escape detection].)

Passive Nondisclosure

Although a person is not guilty of being an accessory if he or she fails or refuses to give incriminating information about a third party to the police, providing a false alibi for that person violates the accessory statute. (*People v. Duty* (1969) 269 Cal.App.2d 97, 103–104 [74 Cal.Rptr. 606].)

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441. Solicitation: Elements

The defendant is charged [in Count ____] with soliciting another person to commit a crime.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant requested [or _____ <*insert other synonyms for solicit as appropriate*>] another person to commit [or join in the commission of] the crime of _____ <*insert target offense*>;**

[AND]

2. **The defendant intended that the crime of _____ <*insert target offense*> be committed(;/.)**

<Give element 3 when instructing that person solicited must receive message; see Bench Notes.>

[AND

3. **The other person received the communication containing the request.]**

To decide whether the defendant intended that the person commit _____ <*insert target offense*>, please refer to the separate instructions that I (will give/have given) you on that crime.

<Alternative A—Corroboration by One Witness>

[The crime of solicitation must be proved by the testimony of at least one witness and corroborating evidence.]

<Alternative B—Corroboration by Two Witnesses>

[The crime of solicitation must be proved by the testimony of at least two witnesses or by the testimony of one witness and corroborating evidence.]

***Corroborating evidence* is evidence that (1) tends to connect the defendant with the commission of the crime and (2) is independent of the evidence given by the witness who testified about the solicitation or independent of the facts testified to by**

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that witness. Corroborating evidence need not be strong or even enough to establish each element by itself. Corroborating evidence may include the defendant's acts, statements, or conduct, or any other circumstance that tends to connect (him/her) to the crime.

[A person is guilty of solicitation even if the crime solicited is not completed or even started. The person solicited does not have to agree to commit the crime.]

[If you find the defendant guilty of solicitation, you must decide how many crimes (he/she) solicited. When deciding this question, consider the following factors:

1. **Were the crimes solicited part of a plan with a single objective or motive or did each crime solicited have a different objective or motive?**
2. **Were the crimes solicited to be committed at the same time?**
3. **Were the crimes solicited to be committed in the same place?**
4. **Were the crimes solicited to be committed in the same way?**
5. **Was the payment, if any, for the crimes solicited one amount or were different amounts solicited for each crime?**

Consider all of these factors when deciding whether the defendant's alleged acts were a single crime or _____ <*insert number of solicitations alleged by the People*> separate crimes of solicitation.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on the elements of the target offense. (See *People v. Baskins* (1946) 72 Cal.App.2d 728, 732 [165 P.2d

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510].) Give all relevant instructions on the target crime alleged. If the crime is solicitation to commit murder, do not instruct on implied malice murder. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 980–981 [191 Cal.Rptr. 408].)

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 3.

A blank has also been provided in element one to permit substituting other words for "solicit." Other approved language includes: to ask, entreat, implore, importune, to make petition to, to plead for, to try to obtain, or to offer or invite another to commit a crime. (*People v. Gordon* (1975) 47 Cal.App.3d 465, 472 [120 Cal.Rptr. 840]; *People v. Phillips* (1945) 70 Cal.App.2d 449, 453 [160 P.2d 872]; *People v. Sanchez* (1998) 60 Cal.App.4th 1490, 1494 [71 Cal.Rptr.2d 309]; *Laurel v. Superior Court for Los Angeles County* (1967) 255 Cal.App.2d 292, 298 [63 Cal.Rptr. 114].)

Penal Code section 653f lists those crimes that may be the target of a solicitation. If the target crime is listed in subdivision (a) or (b) of that section, insert the bracketed portion "[or join in the commission of]." If the target crime is listed in subdivision (c), (d), or (e), of the section, omit that bracketed portion. (See *People v. Herman* (2002) 97 Cal.App.4th 1369, 1380 [119 Cal.Rptr.2d 199.)

When instructing on the corroboration requirements, if the target crime is listed in subdivision (d) or (e) of section 653f, give Alternative A. If the target crime is listed in subdivision (a), (b), or (c) of section 653f, give Alternative B.

Authority is divided on whether the judge or jury is to determine the number of solicitations if multiple crimes were solicited by the defendant. The bracketed portion at the end of the instruction should be given if multiple solicitations have been charged and the trial court determines that this is a question for the jury. (Compare *People v. Davis* (1989) 211 Cal.App.3d 317, 322–323 [259 Cal.Rptr. 348] with *People v. Morocco* (1987) 191 Cal.App.3d 1449, 1454 [237 Cal.Rptr. 113].) If the court decides to present this issue to the jury, multiple target offenses must be

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inserted in elements 1 and 2, and the paragraph immediately following the elements.

AUTHORITY

- Elements. Pen. Code, § 653f.
- Corroboration. *People v. Philips* (1985) 41 Cal.3d 29, 75–76 [222 Cal.Rptr. 127, 711 P.2d 423]; *People v. Baskins* (1946) 72 Cal.App.2d 728, 732 [165 P.2d 510].
- Solicitation Defined. *People v. Gordon* (1975) 47 Cal.App.3d 465, 472 [120 Cal.Rptr. 840]; *People v. Sanchez* (1998) 60 Cal.App.4th 1490, 1494 [71 Cal.Rptr.2d 309]; see *People v. Herman* (2002) 97 Cal.App.4th 1369, 1380 [119 Cal.Rptr.2d 199] [since a minor cannot violate § 288 by engaging in lewd conduct with an adult, an adult who asks a minor to engage in such conduct does not violate § 653f(c)].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

RELATED ISSUES

Crime Committed Outside of California

The solicitation of a person in California to commit a felony outside the state constitutes solicitation. (*People v. Burt* (1955) 45 Cal.2d 311, 314 [288 P.2d 503].)

Solicitation of Murder

When defining the crime of murder, in the case of a solicitation of murder, the trial court must not instruct on implied malice as an element of murder. Because the "crime of solicitation to commit murder occurs when the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing," the person must have express malice to be guilty of the solicitation. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 981 [191 Cal.Rptr. 408].) An instruction on murder that includes implied malice as an element has the potential of confusing the jury. (*Ibid.*)

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442. Solicitation of a Minor

The defendant is charged [in Count ____] with soliciting a minor to commit a crime.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant voluntarily (asked/ [or] encouraged / [or] induced/ [or] intimidated) a minor to commit the crime of _____ <*insert target offense*>;**
2. **(He/She) intended that the minor commit the crime of _____ <*insert target offense*>;**

[AND]

3. **At the time of the offense, the defendant was at least 18 years old(;/.)**

[AND]

<Alternative 4—defendant five years older>

[4. At the time of the offense, the minor was 16 or 17 years old, and the defendant was at least 5 years older than the minor(;/.)]

<Give element 5 when instructing that person solicited must receive message; see Bench Notes.>

[AND

5. **The minor received the communication containing the request.]**

To decide whether the defendant intended that the minor commit _____ <*insert target offense*>, please refer to the separate instructions that I (will give/have given) you on that crime.

A *minor* is a person under the age of 18.

[If you find the defendant guilty of solicitation, you must decide how many crimes (he/she) solicited. When deciding this question, consider the following factors:

1. **Were the crimes solicited part of a plan with a single objective or motive or did each crime solicited have a different objective or motive?**

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2. Were the crimes solicited to be committed at the same time?

3. Were the crimes solicited to be committed in the same place?

4. Were the crimes solicited to be committed in the same way?

5. Was the payment, if any, for the crimes solicited one amount or were different amounts solicited for each crime?

Consider all of these factors when deciding whether the defendant's alleged acts were a single crime or _____ <*insert number of solicitations alleged by the People*> separate crimes of solicitation.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the minor is 16 or 17 years old, the jury must find that the defendant is at least 5 years older and the court must instruct **sua sponte** on element 3A. (Pen. Code, § 653j(a).) Give element 3B if element 3A does not apply.

The court has a **sua sponte** duty to instruct on the elements of the target offense. (See *People v. Baskins* (1946) 72 Cal.App.2d 728, 732 [165 P.2d 510].) Give all relevant instructions on the target crime alleged. Penal Code section 653j lists those offenses that may be the target of a solicitation of a minor. If the crime is solicitation to commit murder, do not instruct on implied malice murder. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 980–981 [191 Cal.Rptr. 408].)

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether

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the intended person actually received the communication, give bracketed element 4.

Authority is divided on whether the judge or jury is to determine the number of solicitations if multiple crimes were solicited by the defendant. The bracketed portion at the end of the instruction should be given if multiple solicitations have been charged and the trial court determines that this is a question for the jury. (Compare *People v. Davis* (1989) 211 Cal.App.3d 317, 322–323 [259 Cal.Rptr. 348] with *People v. Morocco* (1987) 191 Cal.App.3d 1449, 1454 [237 Cal.Rptr. 113].) If the court decides to present this issue to the jury, multiple target offenses must be inserted in elements 1 and 2, and the paragraph immediately following the elements.

AUTHORITY

- Elements. Pen. Code, § 653j.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.10, 141.11 (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 441, *Solicitation: Elements*.

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443. Compelling Another to Commit Crime

If the defendant forced another person to commit a crime by threatening, menacing, commanding, or coercing that person, then the defendant is guilty of the crime that the defendant forced the other person to commit.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the theory of liability advanced by the prosecution. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318] [sua sponte duty to instruct on aiding and abetting].)

AUTHORITY

- Principals Defined. Pen. Code, § 31.

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10 (Matthew Bender).

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D. CORPORATE OFFICERS

450. Liability of Corporate Officers and Agents: Single Theory of Liability

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The defendant is charged [in Count ____] with _____ <*insert offense charged*> while acting as an (officer/ [or] agent) of a corporation.

The People must prove that the defendant (personally committed/ was a direct participant in) the crime charged. The fact that the defendant is an (officer/ [or] agent) of the corporation is not sufficient by itself to support a finding of guilt.

<*Alternative A—prosecution alleges only that defendant committed prohibited act personally*>

[To prove that the defendant personally committed the crime charged, the People must prove that the defendant _____ <*insert description of conduct alleged in offense*>.]

<*Alternative B—prosecution alleges only that defendant had authority to control conduct of others*>

[To prove that the defendant was a direct participant in the crime charged, the People must prove that:

1. **The defendant had the authority to control _____ <*insert description of conduct alleged in offense*>;**

[AND]

2. **The defendant (failed to/authorized/caused/permitted) _____ <*insert description of conduct alleged in offense*>(;/.)**

<*Alternative 3A: Give if offense alleged requires only knowledge or general criminal intent.*>

[AND

3. **The defendant knew _____ <*insert description of knowledge about conduct alleged in offense*>(;/.)**

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<Alternative 3B: Give if offense alleged requires specific intent.>

[AND

3. When the defendant acted, (he/she) intended to _____ <*insert description of specific intent required*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction in any case where the defendant is charged as the officer or agent of a corporation. (See *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [30 Cal.Rptr.2d 681]; *Otis v. Superior Court* (1905) 148 Cal. 129, 131 [82 P. 853].) Repeat this instruction for each offense, inserting the specific requirements for that offense.

If the prosecution alleges that the defendant personally committed some or all of the acts alleged in the offense, give alternative A. If the prosecution's theory is solely that the defendant had control over the conduct alleged, give alternative B. If the prosecution is pursing both theories of liability, do not give this instruction. Give CALCRIM No. 451, *Liability of Corporate Officers and Agents: Two Theories of Liability*.

Give element 3A if the alleged offense requires knowledge or general criminal intent by the defendant. (See *Sea Horse Ranch, supra,* 24 Cal.App.4th at pp. 456–458; *People v. Epstein* (1931) 118 Cal.App. 7, 10 [4 P.2d 555].) Give element 3B if specific intent is required. If a strict-liability offense is alleged, give only elements 1 and 2. (See *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062 [9 Cal.Rptr.2d 348].)

Example

In *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446 [30 Cal.Rptr.2d 681], the defendant was charged as the president of a corporation with involuntary manslaughter based on a horse's escape from the ranch that caused a fatal vehicle accident. The instruction in such a case could read:

> To prove that the defendant was a direct participant in the crime charged, the People must prove that:
>
> 1. The defendant had the authority to control the maintenance of the fences.

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2. The defendant failed to ensure that the fences were properly maintained.

AND

3. The defendant knew that horses had repeatedly escaped from the ranch due to poor maintenance of the fences.

AUTHORITY

- Liability of Corporate Officer or Agent. *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [30 Cal.Rptr.2d 681]; see *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062 [9 Cal.Rptr.2d 348]; *Otis v. Superior Court* (1905) 148 Cal. 129, 131 [82 P. 853].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 95–96.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.12 (Matthew Bender).

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451. Liability of Corporate Officers and Agents: Two Theories of Liability

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The defendant is charged [in Count ____] with _____ <*insert offense charged*> while acting as an (officer/ [or] agent) of a corporation.

The People must prove that the defendant either personally committed or was a direct participant in the crime charged. The fact that the defendant is an (officer/ [or] agent) of the corporation is not sufficient by itself to support a finding of guilt.

To prove that the defendant personally committed the crime charged, the People must prove that the defendant _____ <*insert description of conduct alleged in offense*>.

To prove that the defendant was a direct participant in the crime charged, the People must prove that:

1. **The defendant had the authority to control _____ <*insert description of conduct alleged in offense*>;**

[AND]

2. **The defendant (failed to/authorized/caused/permitted) _____ <*insert description of conduct alleged in offense*>(;/.)**

<Alternative 3A: Give if offense alleged requires only knowledge or general criminal intent.>

[AND

3. **The defendant knew _____ <*insert description of knowledge about conduct alleged in offense*>(;/.)**

<Alternative 3B: Give if offense alleged requires specific intent.>

[AND

3. **When the defendant acted, (he/she) intended to _____ <*insert description of specific intent required*>.]**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction in any case where the defendant is charged as the officer or agent of a corporation. (See *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [30 Cal.Rptr.2d 681]; *Otis v. Superior Court* (1905) 148 Cal. 129, 131 [82 P. 853].) Repeat this instruction for each offense, inserting the specific requirements for that offense.

If the prosecution alleges only one theory of liability, do not give this instruction. Give CALCRIM No. 450, *Liability of Corporate Officers and Agents: Single Theory of Liability*.

Give element 3A if the alleged offense requires knowledge or general criminal intent by the defendant. (See *Sea Horse Ranch, supra,* 24 Cal.App.4th at pp. 456–458; *People v. Epstein* (1931) 118 Cal.App. 7, 10 [4 P.2d 555].) Give element 3B if specific intent is required. If a strict-liability offense is alleged, give only elements 1 and 2. (See *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062 [9 Cal.Rptr.2d 348].)

For an example of how to complete this instruction, see the Bench Notes to CALCRIM No. 450, *Liability of Corporate Officers and Agents: Single Theory of Liability*.

It is unclear if the court is required to instruct on unanimity. For a discussion of instructional requirements on unanimity, see CALCRIM No. 3500, *Unanimity*.

AUTHORITY

- Liability of Corporate Officer or Agent. *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [30 Cal.Rptr.2d 681]; see *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062 [9 Cal.Rptr.2d 348]; *Otis v. Superior Court* (1905) 148 Cal. 129, 131 [82 P. 853].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 95–96.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.12 (Matthew Bender).

(New January 2006)

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E. ATTEMPT

460. Attempt Other Than Attempted Murder

[The defendant is charged [in Count ____] with attempted _____ <*insert target offense*>.]

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took a direct but ineffective step toward committing _____ <*insert target offense*>;**

AND

2. **The defendant intended to commit _____ <*insert target offense*>.**

A *direct step* requires more than merely planning or preparing to commit _____ <*insert target offense*> or obtaining or arranging for something needed to commit _____ <*insert target offense*>. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit _____ <*insert target offense*>. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to commit _____ <*insert target offense*> is guilty of attempted _____ <*insert target offense*> even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing _____ <*insert target offense*>, then that person is not guilty of attempted _____ <*insert target offense*>.]

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To decide whether the defendant intended to commit _____ <*insert target offense*>, please refer to the separate instructions that I (will give/have given) you on that crime.

[The defendant may be guilty of attempt even if you conclude that _____ <*insert target offense*> was actually completed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the crime of attempt when charged, or, if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (*See People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

If an attempted crime is charged, give the first bracketed paragraph and choose the phrase "this crime" in the opening line of the second paragraph. If an attempted crime is not charged but is a lesser included offense, omit the first bracketed paragraph and insert the attempted target offense in the opening line of the second paragraph.

Give the bracketed paragraph that begins with "A person who attempts to commit" if abandonment is an issue.

If the attempted crime is murder, do not give this instruction; instead give the specific instruction on attempted murder. (*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709]; see CALCRIM No. 600, *Attempted Murder*.)

Do not give this instruction if the crime charged is assault. There can be no attempt to commit assault, since an assault is by definition an attempted battery. (*In re James M.* (1973) 9 Cal.3d 517, 522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 664; *People v. Toledo* (2001) 26 Cal.4th 221, 229–230 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Conviction for Charged Attempt Even If Crime Is Completed. Pen. Code, § 663.

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 53–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.20 (Matthew Bender).

RELATED ISSUES

Insufficient Evidence of Attempt

The court is not required to instruct on attempt as a lesser-included offense unless there is sufficient evidence that the crime charged was not completed. (*People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436 [263 Cal.Rptr. 314]; *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1743–1744 [60 Cal.Rptr.2d 357]; *People v. Strunk* (1995) 31 Cal.App.4th 265, 271–272 [36 Cal.Rptr.2d 868].)

Legal or Factual Impossibility

Although legal impossibility is a defense to attempt, factual impossibility is not. (*People v. Cecil* (1982) 127 Cal.App.3d 769, 775–777 [179 Cal.Rptr. 736]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 504–505 [215 Cal.Rptr. 352].)

Solicitation

Some courts have concluded that a mere solicitation is not an attempt. (*People v. Adami* (1973) 36 Cal.App.3d 452, 457 [111 Cal.Rptr. 544]; *People v. La Fontaine* (1978) 79 Cal.App.3d 176, 183 [144 Cal.Rptr. 729], overruled on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292–293 [79 Cal.Rptr.2d 195, 965 P.2d 713].) At least one court disagrees, stating that simply because "an invitation to participate in the defendant's commission of a crime consists only of words does not mean it cannot constitute an 'act' toward the completion of the crime, particularly where the offense by its nature consists of or requires the requested type of participation." (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1387 [119 Cal.Rptr.2d 199] [attempted lewd acts on a child under Pen. Code, § 288(c)(1)]; see *People v. Delvalle* (1994) 26 Cal.App.4th 869, 877 [31 Cal.Rptr.2d 725.)

Specific Intent Crime

An attempted offense is a specific intent crime, even if the underlying crime requires only general intent. (See *People v. Martinez* (1980) 105

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Cal.App.3d 938, 942 [165 Cal.Rptr. 11].) However, an attempt is not possible if the underlying crime can only be committed unintentionally. (See *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798] [no attempted involuntary manslaughter].)

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723. Special Circumstances: Murder to Prevent Arrest or Complete Escape, Pen. Code, § 190.2(a)(5)

724. Special Circumstances: Murder of Peace Officer, Federal Officer, or Firefighter, Pen. Code, § 190.2(a)(7), (8) & (9)

725. Special Circumstances: Murder of Witness, Pen. Code, § 190.2(a)(10)

726. Special Circumstances: Murder of Judge, Prosecutor, Government Official, or Juror, Pen. Code, §§ 190.2(a)(11), (12), (13) & (20)

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727. Special Circumstances: Lying in Wait—Before March 8, 2000, Pen. Code, § 190.2(a)(15)

728. Special Circumstances: Lying in Wait—After March 7, 2000, Pen. Code, § 190.2(a)(15)

729. Special Circumstances: Murder Because of Race, Religion, or Nationality, Pen. Code, § 190.2(a)(16)

730. Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)

731. Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill, Pen. Code, § 190.2(a)(17) (After March 8, 2000)

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733. Special Circumstances: Murder With Torture, Pen. Code, § 190.2(a)(18)

734. Special Circumstances: Murder by Poison, Pen. Code, § 190.2(a)(19)

735. Special Circumstances: Discharge From Vehicle, Pen. Code, § 190.2(a)(21)

736. Special Circumstances: Killing by Street Gang Member, Pen. Code, § 190.2(a)(22)

737. Special Circumstances: Murder of Transportation Worker, Pen. Code, § 190.25

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(iii) Special Circumstances With Prior Murder

750. Special Circumstances: Prior Murder Conviction, Pen. Code, § 190.2(a)(2)—Trial on Prior Murder, Pen. Code, § 190.1(a) & (b)

751. Second Degree Murder With Prior Prison for Murder, Pen. Code, § 190.05

752–759. Reserved for Future Use

L. DEATH PENALTY

760. Death Penalty: Introduction to Penalty Phase

761. Death Penalty: Duty of Jury

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763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating

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764. Death Penalty: Evidence of Other Violent Crimes
765. Death Penalty: Conviction for Other Felony Crimes
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775. Death Penalty: Mental Retardation
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A. GENERAL PRINCIPLES

500. Homicide: General Principles

Homicide is the killing of one human being by another. (Murder/ [and] (Manslaughter/manslaughter)) (is/are) [a] type[s] of homicide. The defendant is charged with (murder/ [and] manslaughter). [Manslaughter is a lesser offense to murder.]

[A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing in this case was unlawful and, if so, what specific crime was committed. I will now instruct you in more detail on what is a legally permissible excuse or justification for homicide.] [I will [also] instruct you on the different types of (murder/ [and] manslaughter).]

BENCH NOTES

Instructional Duty

This instruction should be given if there are multiple theories of homicide or evidence supporting justification or excuse, as a way of introducing the jury to the law of homicide.

If no homicide defense instructions are given, do not give the bracketed language in the second paragraph beginning "A homicide can be lawful . . . ." If no instructions will be given on offenses other than first degree murder, do not give the last bracketed sentence.

AUTHORITY

- Homicide Defined. *People v. Antick* (1975) 15 Cal.3d 79, 87 [123 Cal.Rptr. 745, 539 P.2d 43].
- Justification or Excuse. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217], disapproved on

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other grounds in *People v. McCoy* (2001) 25 Cal.4th 1111, 1123 [108 Cal.Rptr.2d 188, 24 P.3d 1210].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 91.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01, 142.02 (Matthew Bender).

COMMENTARY

The committee decided that a short introduction on the law of homicide would help the jury understand basic principles governing a complicated body of law. By giving the jury a simple framework, this instruction will help the jurors understand the rest of the instructions. Although "homicide" is a classic legal term, the committee decided to use the word because it appears to now be a part of lay vocabulary and therefore easily recognizable by jurors.

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B. JUSTIFICATIONS AND EXCUSES

505. Justifiable Homicide: Self-Defense or Defense of Another

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The defendant is not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter) if (he/she) was justified in (killing/attempting to kill) someone in (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ <*insert other forcible and atrocious crime*>)];**
2. **The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;**

AND

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the [attempted] killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have

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believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <*insert name of decedent/victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <*insert name of decedent/victim*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of decedent/victim*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/_____ <*insert forcible and atrocious crime*>) has passed. This is so even if safety could have been achieved by retreating.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty

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of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rtpr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra,* 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337].)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 223, 526 P.2d 241].) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of

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one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select "raped," "maimed," or "robbed," or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.

Related Instructions

CALCRIM Nos. 506–511, Justifiable and Excusable Homicides.

CALCRIM Nos. 3470–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

AUTHORITY

- Justifiable Homicide. Pen. Code, §§ 197–199.
- Fear. Pen. Code, § 198.
- Lawful Resistance. Pen. Code, §§ 692–694.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [264 Cal.Rptr.2d 142].
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. Pen. Code, § 198.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 64–77.

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [131 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 99 P.2d 675]; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact

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instruction was required where two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471.)

Transferred Intent Applies

"[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander." (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628]; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [37 Cal.Rptr.2d 304].) There is no sua sponte duty to instruct on this principle, although such an instruction must be given on request when substantial evidence supports it. (*People v. Mathews, supra,* 91 Cal.App.3d at p. 1025; see also CALCRIM No. 562, *Transferred Intent*.)

Definition of "Imminent"

In *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1], the jury requested clarification of the term "imminent." In response, the trial court instructed:

> "Imminent peril," as used in these instructions, means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the defendant as immediate and present and not prospective

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> or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.

(Ibid.)

The Court of Appeal agreed with this definition of "imminent." (*Id.* at pp. 1187–1190 [citing *People v. Scoggins* (1869) 37 Cal. 676, 683–684].)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

(New January 2006)

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506. Justifiable Homicide: Defending Against Harm to Person Within Home or on Property

The defendant is not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) to defend (himself/herself) [or any other person] in the defendant's home. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant reasonably believed that (he/she) was defending a home against _____ <*insert name of decedent*>, who (intended to or tried to commit _____ <*insert forcible and atrocious crime*>/ [or] violently[[,] [or] riotously[,]/ [or] tumultuously] tried to enter that home intending to commit an act of violence against someone inside);**
2. **The defendant reasonably believed that the danger was imminent;**
3. **The defendant reasonably believed that the use of deadly force was necessary to defend against the danger;**

AND

4. **The defendant used no more force than was reasonably necessary to defend against the danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, then the [attempted] killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/_____ <*insert forcible and atrocious crime*>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give defense instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rtpr.2d 569, 906 P.2d 531]; *People v. Slater* (1943) 60 Cal.App.2d 358, 367–368 [140 P.2d 846] [error to refuse instruction based on Pen. Code, § 197, subd. 2 when substantial evidence supported inference that victim intended to enter the habitation].)

Penal Code section 197, subdivision 2 provides that "defense of habitation" may be used to resist someone who "intends or endeavors, by violence or surprise, to commit a felony . . . ." (Pen. Code, § 197, subd. 2.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that the felony feared must be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) Forcible and atrocious crimes are those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos, supra,* 12 Cal.3d at p. 479.) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) *Ceballos* specifically held that burglaries which "do not reasonably create a fear of great bodily harm" are not sufficient "cause for exaction of human life." (*Id.* at p. 479.) Thus, although the statute refers to "defense of habitation," *Ceballos* requires that a person be at risk of great bodily harm or an atrocious felony in order to justify homicide. *(Ibid.)* The instruction has been drafted accordingly.

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If the defendant is asserting that he or she was resisting the commission of a forcible and atrocious crime, give the first option in element 1 and insert the name of the crime. If there is substantial evidence that the defendant was resisting a violent entry into a residence for the general purpose of committing violence against someone inside, give the second option in element 1. (See Pen. Code, § 197, subd. 2.) The court may give the bracketed words "riotously" and "tumultuously" at its discretion.

Related Instructions

CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury*.

AUTHORITY

- Instructional Requirements. Pen. Code, § 197, subd. 2.
- Actual and Reasonable Fear. See Pen. Code, § 198; see *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1361 [37 Cal.Rptr.2d 304].
- Burden of Proof. Pen. Code, § 189.5.
- Fear of Imminent Harm. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rtpr.2d 146, 921 P.2d 1]; *People v. Lucas* (1958) 160 Cal.App.2d 305, 310 [324 P.2d 333].
- Forcible and Atrocious Crimes. *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241].
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 78.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.13 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

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507. Justifiable Homicide: By Public Officer

The defendant is not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter) if (he/ she) (attempted to kill/killed) someone while (acting as a public officer/obeying a public officer's command for aid and assistance). Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant was (a public officer/obeying a public officer's command for aid and assistance);**
2. **The [attempted] killing was committed while (taking back into custody a convicted felon [or felons] who had escaped from prison or confinement[,]/ arresting a person [or persons] charged with a felony who (was/were) resisting arrest or fleeing from justice[,]/ overcoming actual resistance to some legal process[,]/ [or] while performing any [other] legal duty);**
3. **The [attempted] killing was necessary to accomplish (one of those/that) lawful purpose[s];**

AND

4. **The defendant had probable cause to believe that _____ <*insert name of decedent*> posed a threat of serious physical harm, either to the defendant or to others [or that _____ <*insert name of decedent*> had committed _____ <*insert forcible and atrocious crime*>].** <*See Bench Note discussing this element.*>

A person has *probable cause* to believe that someone poses a threat of serious physical harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause serious physical harm to another.

[An officer or employee of _____ <*insert name of state or local government agency that employs public officer*> is a *public officer*.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People

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have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

In element 2, select the phrase appropriate for the facts of the case.

It is unclear whether the officer must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the officer has probable cause to believe that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is, when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371–375 [131 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm.]) The committee has provided both options in element 4. The court should review relevant case law before giving the bracketed language.

As with a peace officer, the jury must determine whether the defendant was a public officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury in the appropriate definition of "public officer" from the statute (e.g., "a Garden

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Grove Regular Police Officer and a Garden Grove Reserve Police Officer are public officers"). *(Ibid.)* However, the court may not instruct the jury that the defendant was a public officer as a matter of law (e.g., "Officer Reed was a public officer"). *(Ibid.)*

Related Instructions

CALCRIM No. 508, *Justifiable Homicide: Citizen Arrest (Non-Peace Officer).*

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace.*

AUTHORITY

- Justifiable Homicide by Public Officer. Pen. Code, §§ 196, 199.
- Burden of Proof. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217]; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Public Officer. See Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567 fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 82, 85, 243.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1], [2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

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RELATED ISSUES

Killing Committed in Obedience to Judgment

A homicide is also justifiable when committed by a public officer "in obedience to any judgment of a competent court." (Pen. Code, § 196, subd. 1.) There are no reported cases construing this subdivision. This provision appears to apply exclusively to lawful executions.

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508. Justifiable Homicide: Citizen Arrest (Non-Peace Officer)

The defendant is not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter) if (he/ she) (killed/attempted to kill) someone while trying to arrest him or her for a violent felony. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant committed the [attempted] killing while lawfully trying to arrest or detain _____ <*insert name of decedent*> for committing the crime of _____ <*insert forcible and atrocious crime or felony that threatened death or great bodily harm*>;**
2. **_____ <*insert name of decedent*> actually committed the crime of _____ <*insert forcible and atrocious crime or felony*>;**
3. **The defendant had reason to believe that _____ <*insert name of decedent*> had committed _____ <*insert forcible and atrocious crime*>];**
4. **The defendant had reason to believe that _____ <*insert name of decedent*> posed a threat of serious physical harm, either to the defendant or to others [or knew that _____ <*insert name of decedent*> had committed _____ <*insert forcible and atrocious crime*>];**

AND

5. **The [attempted] killing was necessary to prevent _____'s <*insert name of decedent*> escape.**

A person has *reason to believe* that someone poses a threat of serious physical harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause serious physical harm to another.

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

It is unclear whether the defendant must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the defendant knows that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used by a law enforcement officer to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is either when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371–375 [132 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm.]) The committee has provided both options in element 4. The court should review relevant case law before giving the bracketed language.

Related Instructions

CALCRIM No. 507, *Justifiable Homicide: By Public Officer.*

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace*.

AUTHORITY

- Justifiable Homicide to Preserve the Peace. Pen. Code, §§ 197, subd. 4, 199.

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- Lawful Resistance to Commission of Offense. Pen. Code, §§ 692–694.
- Private Persons, Authority to Arrest. Pen. Code, § 837.
- Burden of Proof. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr. 217].
- Felony Must Threaten Death or Great Bodily Injury. *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 80–86

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1], [3] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

RELATED ISSUES

Felony Must Actually Be Committed

A private citizen may use deadly force to apprehend a fleeing felon only if the suspect in fact committed the felony and the person using deadly force had reasonable cause to believe so. (*People v. Lillard* (1912) 18 Cal.App. 343, 345 [123 P. 221].)

Felony Committed Must Threaten Death or Great Bodily Injury

Deadly force is permissible to apprehend a felon if "the felony committed is one which threatens death or great bodily injury. . . ." (*People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830]).

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509. Justifiable Homicide: Non-Peace Officer Preserving the Peace

The defendant is not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter) if (he/ she) (killed/attempted to kill) someone while preserving the peace. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant committed the [attempted] killing while lawfully (suppressing a riot/keeping and preserving the peace);**
2. **The defendant had probable cause to believe that _____ <*insert name of decedent*> posed a threat of serious physical harm, either to the defendant or someone else;**

AND

3. **The [attempted] killing was necessary to lawfully (suppress a riot/keep and preserve the peace).**

A person has *probable cause* to believe that someone poses a threat of serious physical harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause serious physical harm to another.

[A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by use of force or violence or by threat to use force or violence with the immediate ability to carry out those threats.]

[A disturbance of the public peace may happen in any place of confinement. _____ <*insert name of detention facility*> is a place of confinement.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

Related Instructions

CALCRIM No. 507, *Justifiable Homicide: By Public Officer.*

CALCRIM No. 508, *Justifiable Homicide: Citizen Arrest (Non-Peace Officer).*

AUTHORITY

- Justifiable Homicide to Preserve the Peace. Pen. Code, §§ 197, subd. 4, 199.
- Lawful Resistance to the Commission of an Offense. Pen. Code, §§ 692–694.
- Riot Defined. Pen. Code, § 404(a).
- Burden of Proof. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr. 217].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 80–86.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.14 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

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RELATED ISSUES

Person Using Force Must Fear Imminent Death or Bodily Injury

"Deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." (*Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1].) "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].)

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510. Excusable Homicide: Accident

The defendant is not guilty of (murder/ [or] manslaughter) if (he/ she) killed someone as a result of accident or misfortune. Such a killing is excused, and therefore not unlawful, if:

1. **The defendant was doing a lawful act in a lawful way;**
2. **The defendant was acting with usual and ordinary caution;**

AND

3. **The defendant was acting without any unlawful intent.**

A person acts with *usual and ordinary caution* if he or she acts in a way that a reasonably careful person would act in the same or similar situation.

The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter).

BENCH NOTES

Instructional Duty

The trial court has a **sua sponte** duty to instruct on lawful acts that excuse homicide when there is evidence supporting that defense. (See *People v. Hampton* (1929) 96 Cal.App. 157, 159–160 [273 P. 854] [court erred in refusing defendant's requested instruction]; *People v. Slater* (1943) 60 Cal.App.2d 358, 369 [140 P.2d 846]; *People v. Bloyd* (1987) 43 Cal.3d 333, 353–354 [233 Cal.Rptr. 368, 729 P.2d 802] [instruction not required when defendant argued the victim killed herself by accident].)

When this instruction is given, it should always be given in conjunction with CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged* or CALCRIM No. 580, *Involuntary Manslaughter: Lesser Included Offense*, unless vehicular manslaughter with ordinary negligence is charged. (*People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].) A lawful act can be the basis of involuntary manslaughter, but only if that act is committed with *criminal* negligence ("in an unlawful manner or without

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due caution and circumspection"). (Pen. Code, § 192(b).) The level of negligence described in this instruction, 510, is *ordinary* negligence. While proof of ordinary negligence is sufficient to prevent a killing from being excused under Penal Code section 195, subd. 1, proof of ordinary negligence is not sufficient to find a defendant guilty of involuntary manslaughter under Penal Code section 192(b). (*People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].)

Related Instructions

CALCRIM No. 3404, *Accident*.

AUTHORITY

- Excusable Homicide If Committed by Lawful Act. Pen. Code, § 195, subd. 1.
- Burden of Proof. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Instructing With Involuntary Manslaughter. *People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].
- Misfortune as Accident. *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 242.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[5], 73.16 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

RELATED ISSUES

Traditional Self-Defense

In *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358–1359 [37 Cal.Rptr.2d 304], the court held that the claim that a killing was accidental bars the defendant from relying on traditional self-defense not only as a

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defense, but also to negate implied malice. However, in *People v. Elize* (1999) 71 Cal.App.4th 605, 610–616 [84 Cal.Rptr.2d 35], the court reached the opposite conclusion, holding that the trial court erred in refusing to give self-defense instructions where the defendant testified that the gun discharged accidentally. *Elize* relies on two Supreme Court opinions, *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rtpr.2d 569, 906 P.2d], and *People v. Breverman* (1998) 19 Cal.4th 142 [77 Cal.Rptr.2d 142, 960 P.2d 1094]. Because *Curtis* predates these opinions, *Elize* appears to be the more persuasive authority.

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511. Excusable Homicide: Accident in the Heat of Passion

The defendant is not guilty of (murder/ [or] manslaughter) if (he/ she) killed someone by accident while acting in the heat of passion. Such a killing is excused, and therefore not unlawful, if, at the time of the killing:

1. **The defendant acted in the heat of passion;**
2. **The defendant was (suddenly provoked by _____ <*insert name of decedent*>/ [or] suddenly drawn into combat by _____ <*insert name of decedent*>);**
3. **The defendant did not take undue advantage of _____ <*insert name of decedent*>;**
4. **The defendant did not use a dangerous weapon;**
5. **The defendant did not kill _____ <*insert name of decedent*> in a cruel or unusual way;**
6. **The defendant did not intend to kill _____ <*insert name of decedent*> and did not act with conscious disregard of the danger to human life;**

AND

7. **The defendant did not act with criminal negligence.**

A person acts *in the heat of passion* when he or she is provoked into doing a rash act under the influence of intense emotion that obscures his or her reasoning or judgment. The provocation must be sufficient to have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

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It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.

[A *dangerous weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

***Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with *criminal negligence* when:**

1. **He or she acts in a way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter).

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BENCH NOTES

Instructional Duty

The trial court has a **sua sponte** duty to instruct on accident and heat of passion that excuses homicide when there is evidence supporting the defense. (*People v. Hampton* (1929) 96 Cal.App. 157, 159–160 [273 P. 854] [court erred in refusing defendant's requested instruction].)

Related Instructions

CALCRIM No. 510, *Excusable Homicide: Accident*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

AUTHORITY

- Excusable Homicide if Committed in Heat of Passion. Pen. Code, § 195, subd. 2.
- Burden of Proof. Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Deadly Weapon Defined. See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 242; Crimes Against the Person, § 212.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.16 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[1][b], [g], 142.02[2][a] (Matthew Bender).

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RELATED ISSUES

Distinguished From Voluntary Manslaughter

Under Penal Code section 195, subd. 2, a homicide is "excusable," "in the heat of passion" if done "by accident," or on "sudden . . . provocation . . . or . . . combat." (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204 [27 Cal.Rptr. 543], disapproved on other grounds in *People v. Lew* (1968) 68 Cal.2d 774, 778, fn. 1 [69 Cal.Rptr. 102, 441 P.2d 942]; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of "evil design [or] intent"].) The killing must also be on "sudden" provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.)

Distinguished From Involuntary Manslaughter

Involuntary manslaughter requires a finding of gross or criminal negligence. (See Bench Notes to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*; Pen. Code, § 26, subd. 5 [accident requires no "culpable negligence"].)

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512. Presumption That Killing Not Criminal

The law presumes that a killing is not criminal if the person killed dies more than three years and one day from the day of the incident that caused the death.

The People must overcome this presumption by proving that the killing was criminal. If you have a reasonable doubt whether the killing was criminal, you must find the defendant not guilty.

[To count the three year and one day period, begin with the day on which the incident happened. Count that day as one whole day regardless of what time the incident happened.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on presumptions relevant to the issues of the case. (See *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].)

AUTHORITY

- Presumption of Lawful Killing. Pen. Code, § 194.
- Rebuttable Presumptions Affecting Burden of Proof. Evid. Code, §§ 601, 604, 606.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][c] (Matthew Bender).

RELATED ISSUES

May Prosecute Defendant for Attempted Murder and Murder

Double jeopardy does not preclude prosecution of the defendant for attempted murder and also for murder if the victim dies after the

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conviction for attempted murder. (*In re Saul S.* (1985) 167 Cal.App.3d 1061, 1068 [213 Cal.Rptr. 541].)

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C. MURDER: FIRST AND SECOND DEGREE

520. Murder With Malice Aforethought

The defendant is charged [in Count ____] with murder.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act that caused the death of (another person/ [or] a fetus);**

[AND]

2. **When the defendant acted, (he/she) had a state of mind called malice aforethought(;/.)**

<Give element 3 when instructing on justifiable or excusable homicide>

[AND

3. **(He/She) killed without lawful (excuse/[or] justification).]**

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill.

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act;**
2. **The natural consequences of the act were dangerous to human life;**
3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life;**

AND

4. **(He/She) deliberately acted with conscious disregard for (human/ [or] fetal) life.**

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Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[A *fetus* is an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which occurs at seven to eight weeks of development.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[(A/An) _____ <*insert description of person owing duty*> **has a legal duty to (help/care for/rescue/warn/maintain the property of/** _____ <*insert other required action[s]*>**)** _____ <*insert description of decedent/person to whom duty is owed*>**.**

If you conclude that the defendant owed a duty to _____ <*insert name of decedent*>**, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other

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appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351 [43 Cal.Rptr.2d 135], 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give the bracketed portion that begins, "(A/An) _____ <*insert description of person owing duty*> has a legal duty to." Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

Related Instructions

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *Murder: Degrees*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give CALCRIM No. 548, *Murder: Alternative Theories*.

If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

AUTHORITY

- Elements. Pen. Code, § 187.
- Malice. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [123 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].

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- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice. *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 91–97.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable

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consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] ["[t]here is no requirement that the defendant specifically know of the existence of each victim."]) "[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

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521. Murder: Degrees

If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree.

<Select the appropriate section[s]. Give the final two paragraphs in every case.>

<Give if multiple theories alleged.>

[The defendant has been prosecuted for first degree murder under (two/____ <*insert number***>) theories: (1) _____ <***insert first theory, e.g., "the murder was willful, deliberate, and premeditated"***> [and] (2) _____ <***insert second theory, e.g., "the murder was committed by lying in wait"***> [_____ <***insert additional theories***>].**

Each theory of first degree murder has different requirements, and I will instruct you on (both/all ____ <*insert number***>.)**

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]

<A. Deliberation and Premeditation>

[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if (he/she) decided to kill before committing the act that caused death.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be

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reached quickly. The test is the extent of the reflection, not the length of time.]

<B. Torture>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:

1. **(He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;**
2. **(He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

AND

3. **The torture was a cause of death.]**

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person *deliberates* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. **(He/She) concealed (his/her) purpose from the person killed;**
2. **(He/She) waited and watched for an opportunity to act;**

AND

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3. Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.

The lying in wait does not need to continue for any particular period of time, but its duration must show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition supported by evidence from Pen. Code, § 12301>*.**]**

[_____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

<E. Weapon of Mass Destruction>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

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[_____ <*insert type of weapon from Pen. Code, § 11417(a)(1)*> is a *weapon of mass destruction*.]

[_____ <*insert type of agent from Pen. Code, § 11417(a)(2)*> is a *chemical warfare agent*.]]

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. **(He/She) shot a firearm from a motor vehicle;**
2. **(He/She) intentionally shot at a person who was outside the vehicle;**

AND

3. **(He/She) intended to kill that person.**

A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.

A *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/ motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

<H. Poison>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]]

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[_____ <*insert name of substance*> is a *poison*.]

<GIVE FINAL TWO PARAGRAPHS IN EVERY CASE.>

All other murders are of the second degree.

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final two paragraphs in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with "The defendant has been prosecuted for first degree murder under." If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of "deliberate" and "premeditated" if those terms have not already been defined for the jury.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, "_____ is a weapon of mass destruction" or "is a chemical warfare agent," only if the device used is listed in the code section noted in the instruction. For example, "Sarin is a chemical warfare agent." However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, "the defendant used a chemical warfare agent, sarin," or "the material used by the defendant,

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sarin, was a chemical warfare agent." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

AUTHORITY

- Types of Statutory First Degree Murder. Pen. Code, § 189.
- Armor Piercing Ammunition Defined. Pen. Code, § 12323(b).
- Destructive Device Defined. Pen. Code, § 12301.
- Explosive Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined. Pen. Code, § 11417.
- Discharge From Vehicle. *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements. *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined. *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined. *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 102–162.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted First Degree Murder. Pen. Code, §§ 663, 189.
- Attempted Murder. Pen. Code, §§ 663, 187.

RELATED ISSUES

Premeditation and Deliberation—Anderson *Factors*

Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events before the murder that indicate planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) method of the killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942].) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020–1021 [245 Cal.Rptr. 185, 750 P.2d 1342].) *Anderson* also noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. Thus, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*People v. Anderson, supra,* 70 Cal.2d at pp. 24–25.) However, "[t]he *Anderson* guidelines are descriptive, not normative." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 [9 Cal.Rptr.2d 577, 831 P.2d 1159].) The holding did not alter the elements of murder or substantive law but was intended to provide a "framework to aid in appellate review." *(Ibid.)*

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation

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and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder.*

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim's death. "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation]." (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication

"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

Torture-Premeditated Intent to Inflict Pain

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481], the court approved this instruction regarding the length of time

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a person lies in wait: "[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

(Revised August 2006)

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522. Provocation: Effect on Degree of Murder

Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.

If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]

[Provocation does not apply to a prosecution under a theory of felony murder.]

BENCH NOTES

Instructional Duty

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811] [court adequately instructed on relevance of provocation to whether defendant acted with intent to torture for torture murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) This is a pinpoint instruction, to be given on request.

This instruction may be given after CALCRIM No. 521, *Murder: Degrees*.

If the court will be instructing on voluntary manslaughter, give both bracketed portions on manslaughter.

If the court will be instructing on felony murder, give the bracketed sentence stating that provocation does not apply to felony murder.

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AUTHORITY

- Provocation Reduces From First to Second Degree. *People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811].
- Pinpoint Instruction. *People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.16 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01, 142.02 (Matthew Bender).

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523. First Degree Murder: Hate Crime

If you find the defendant guilty of first degree murder [as charged in Count ____], you must then decide whether the People have proved the additional allegation that the murder was a hate crime.

To prove this allegation the People must prove that the defendant committed the murder, in whole or in part, because of the deceased person's actual or perceived (disability[,]/[or] gender[,]/[or] nationality[,]/[or] race or ethnicity[,]/[or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]).

The defendant acted, *in whole or in part, because of* the actual or perceived characteristic[s] of the deceased person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

2. **The bias motivation caused the defendant to commit the alleged murder.**

If you find that the defendant had more than one reason to commit the alleged murder, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

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[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group with (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed. 435].)

This statute was substantially revised, effective January 1, 2005. Prior to that time, the statute was limited to murder committed because of the decedent's disability, gender, or sexual orientation.

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined.*

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AUTHORITY

- Murder That is a Hate Crime. Pen. Code, § 190.03(a).
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 255, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 459.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.44 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[4][a][ii] (Matthew Bender).

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524. Second Degree Murder: Peace Officer

If you find the defendant guilty of second degree murder [as charged in Count ____], you must then decide whether the People have proved the additional allegation that (he/she) murdered a peace officer.

To prove this allegation the People must prove that:

1. **_____ <*insert officer's name, excluding title*> was a peace officer lawfully performing (his/her) duties as a peace officer;**

[AND]

2. **When the defendant killed _____ <*insert officer's name, excluding title*>, the defendant knew, or reasonably should have known, that _____ <*insert officer's name, excluding title*> was a peace officer who was performing (his/her) duties(;/.)**

<Give element 3 when defendant charged with Pen. Code, § 190(c)>

[AND

3. **The defendant (intended to kill the peace officer/ [or] intended to inflict great bodily injury on the peace officer/ [or] personally used a (deadly weapon/ [or] firearm) to kill the peace officer).]**

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

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[The term[s] (*great bodily injury[,]/ deadly weapon[,]/* [and] *firearm)* (is/are) defined in another instruction to which you should refer.]

[Someone *personally uses* a (deadly weapon/ [or] firearm) if he or she intentionally does any of the following:

1. **Displays the weapon in a menacing manner;**
2. **Hits someone with the weapon;**

OR

3. **Fires the weapon.]**

[The People allege that the defendant _____ *<insert all of the factors from element 3 when multiple factors are alleged>***. You may not find the defendant guilty unless you all agree that the People have proved at least one of these alleged facts and you all agree on which fact or facts were proved. You do not need to specify the fact or facts in your verdict.]**

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.]**

[The duties of (a/an) _____ *<insert title of peace officer>* **include** _____ *<insert job duties>*.]**

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged under Penal Code section 190(b), give only elements 1 and 2. If the defendant is charged under Penal Code section 190(c), give all three elements, specifying the appropriate factors in element 3, and give the appropriate definitions, which follow in brackets. Give the bracketed unanimity instruction if the prosecution alleges more than one factor in element 3.

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." (*Ibid.*) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

Give the relevant bracketed definitions unless the court has already given the definitions in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). (*Ibid.*) However, the court may not instruct the jury that the alleged victim

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was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

"Peace officer," as used in this statute, means "as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5." (Pen. Code, § 190(b) & (c).)

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title* . . . .> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

AUTHORITY

- Second Degree Murder of a Peace Officer. Pen. Code, § 190(b) & (c).
- Personally Used Deadly Weapon. Pen. Code, § 12022.
- Personally Used Firearm. Pen. Code, § 12022.5.
- Personal Use. Pen. Code, § 1203.06(b)(3).

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 164.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, Defenses and Justifications, § 73.15[2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, Death Penalty, § 87.13[7] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, Crimes Against the Person, § 142.01[4][c] (Matthew Bender).

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525. Second Degree Murder: Discharge From Motor Vehicle

If you find the defendant guilty of second degree murder [as charged in Count ____], you must then decide whether the People have proved the additional allegation that the murder was committed by shooting a firearm from a motor vehicle.

To prove this allegation, the People must prove that:

1. **(The defendant/**_____ <*insert name or description of principal if not defendant*>**) killed a person by shooting a firearm from a motor vehicle;**
2. **(The defendant/**_____ <*insert name or description of principal if not defendant*>**) intentionally shot at a person who was outside the vehicle;**

AND

3. **When (the defendant/**_____ <*insert name or description of principal if not defendant*>**) shot a firearm, (the defendant/**_____ <*insert name or description of principal if not defendant*>**) intended to inflict great bodily injury on the person outside the vehicle.**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/ motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>**).]**

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term[s] (*great bodily injury[,]/ firearm[,]/* [and] *motor vehicle)* (is/are) defined in another instruction to which you should refer.]

[The People must prove that the defendant intended that the person shot at suffer great bodily injury when (he/she/_____ <*insert name or description of principal if not defendant*>**) shot**

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from the vehicle. However, the People do not have to prove that the defendant intended to injure the specific person who was actually killed.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed. 435].)

The statute does not specify whether the defendant must personally intend to inflict great bodily injury or whether accomplice liability may be based on a principal who intended to inflict great bodily injury even if the defendant did not. The instruction has been drafted to provide the court with both alternatives in element 3.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed paragraph that begins with "The People must prove that the defendant intended," if the evidence shows that the person killed was not the person the defendant intended to harm when shooting from the vehicle. (*People v. Sanchez* (2001) 26 Cal.4th 834, 851, fn. 10 [11 Cal.Rptr.2d 129, 29 P.3d 209].)

AUTHORITY

- Second Degree Murder, Discharge From Vehicle. Pen. Code, § 190(d).

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 164.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][a], [2][a][vii], [4][c] (Matthew Bender).

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D. FELONY MURDER

Introduction to Felony-Murder Series

The Supreme Court recently reiterated that the analysis to be used in determining whether a defendant is liable for a death under the felony-murder rule depends in part on whether the defendant personally caused the death. (*People v. Cavitt* (2004) 33 Cal.4th 187, 193; see also *People v. Billa* (2003) 31 Cal.4th 1064, 1072.) Based on the reasoning of *Cavitt*, the committee has provided three separate instructions for both first and second degree felony murder. These instructions present the following options:

A. Defendant Allegedly Committed Fatal Act
B. Coparticipant Allegedly Committed Fatal Act
C. Other Acts Allegedly Caused Death

For a simple case in which the defendant allegedly personally caused the death by committing a direct act of force or violence against the victim, the court may use an option A instruction. This option contains the least amount of bracketed material and requires the least amount of modification by the court.

In a case where the prosecution alleges that the defendant is a "nonkiller cofelon" liable under the felony-murder rule for a death caused by another participant in the felony, then the court must use an option B instruction. This option allows the court (1) to instruct that the defendant may have committed the underlying felony or may have aided and abetted or conspired to commit an underlying felony that actually was committed by a coparticipant; and (2) to instruct on the additional logical nexus required to show that a nonkiller is liable for a death caused by a cofelon. (*People v. Cavitt, supra*, 33 Cal.4th at p. 193.)

If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, the court should give both option A and option B instructions.

In addition, the committee has provided option C instructions to account for the unusual factual situations where a victim dies during the course of a felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants. (See *People v. Billa, supra*, 31 Cal.4th at p. 1072.) Each option C instruction states that "[t]he commission [or

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attempted commission of] the _____ <*insert felony or felonies*> caused the death of another person." These instructions also include paragraphs on causation as well as elements requiring a temporal and logical nexus between the felony and the death. Option C is the most complicated of the three options provided. Thus, although option C is broad enough to cover most felony-murder scenarios, the committee recommends using an option A or B instruction whenever appropriate to avoid providing the jury with unnecessarily complicated instructions.

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540A. Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act

The defendant is charged [in Count ____] with murder, under a theory of felony murder.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant committed [or attempted to commit] _____ <*insert felony or felonies from Pen. Code, § 189*>;**
2. **The defendant intended to commit _____ <*insert felony or felonies from Pen. Code, § 189*>;**

AND

3. **While committing [or attempting to commit] _____, <*insert felony or felonies from Pen. Code, § 189*> the defendant did an act that caused the death of another person.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ <*insert felony or felonies from Pen. Code, § 189*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES ARE GIVEN.>

[The defendant must have intended to commit the (felony/felonies) of _____ <*insert felony or felonies from Pen. Code, § 189*> before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

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[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have intended to commit the felony." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

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The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837].) A finding of a specific intent to kill is required in order to find first degree murder under this clause. *(Ibid.)*

If the prosecutor is proceeding under both malice and felony-murder theories, also give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

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If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required. *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[7] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Second Degree Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

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RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder

If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99] [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)*.

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony

"Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769] [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [122 Cal.Rptr.2d 545] [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [150 Cal.Rptr. 515] [noting the problems of applying the felony-murder rule to a nondangerous daytime auto burglary].)

Duress

"[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [122 Cal.Rptr.2d 587, 50 P.3d 368] [dictum]; see also CALCRIM No. 3402, *Duress or Threats*.)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 752].)

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Merger: Ireland *Rule*

In *People v. Ireland* the court held that assault could not form the basis of a charge for second degree felony murder because the assaultive conduct "merges" with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [75 Cal.Rptr. 188, 450 P.2d 580] [merger based on assault with a deadly weapon].) Although merger is typically an issue in second degree felony murder, in *People v. Garrison* (1989) 47 Cal.3d 746, 778 [254 Cal.Rptr. 257, 765 P.2d 419], the court held that first degree felony murder cannot be based on a burglary where the intent on entry is to commit an assault. (See also *People v. Baker* (1999) 74 Cal.App.4th 243, 251 [87 Cal.Rptr.2d 803] [conspiracy to commit assault may not be basis for first degree felony murder]; for further discussion, see the Related Issues section of CALCRIM No. 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act*.)

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540B. Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act

<Give the following introductory sentence when not giving Instruction 540A.>

[The defendant is charged [in Count ____] with murder, under a theory of felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert felony or felonies from Pen. Code, § 189>*;
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert felony or felonies from Pen. Code, § 189>*;
3. **If the defendant did not personally commit [or attempt to commit]** _____ *<insert felony or felonies from Pen. Code, § 189>*, **then a perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 189>*;

[AND]

4. **While committing [or attempting to commit]** _____, *<insert felony or felonies from Pen. Code, § 189>* **the perpetrator did an act that caused the death of another person(;/.)**

<Give element 5 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>

[AND

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5. **There was a logical connection between the act causing the death and the _____ <*insert felony or felonies from Pen. Code, § 189*> [or attempted _____ <*insert felony or felonies from Pen. Code, § 189*>]. The connection between the fatal act and the _____ <*insert felony or felonies from Pen. Code, § 189*> [or attempted _____ <*insert felony or felonies from Pen. Code, § 189*>] must involve more than just their occurrence at the same time and place.]**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ <*insert felony or felonies from Pen. Code, § 189*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/ have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ <*insert felony or felonies from Pen. Code, § 189*> before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

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[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

Bracketed element 5 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rtpr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a

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cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) Give bracketed element 5 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 5. (See discussion of conspiracy liability in the Related Issues section below.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

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The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

Related Instructions

CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles*.

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CALCRIM No. 415 et seq., *Conspiracy*.

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required. *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 80, 87; Crimes Against the Person, §§ 134–147, 156.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Second Degree Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

RELATED ISSUES

Conspiracy Liability—Natural and Probable Consequences

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and

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probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy.

In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations]." In the court's two most recent opinions on felony-murder complicity, the court refers to the liability of "cofelons" or "accomplices" without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra,* 33 Cal.4th at p. 194; *People v. Billa, supra,* 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.

The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt, supra,* 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.

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Thus, if the trial court is faced with a factual situation in which the defendant's liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give bracketed element 6 requiring a logical nexus between the felony and the act causing death; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court's discretion, add as element 7, "The act causing the death was a natural and probable consequence of the plan to commit _____ <*insert felony or felonies from Pen. Code, § 189*>."

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*.

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540C. Felony Murder: First Degree—Other Acts Allegedly Caused Death

The defendant is charged [in Count ____] with murder, under a theory of felony murder.

The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ <*insert felony or felonies from Pen. Code, § 189*>**;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ <*insert felony or felonies from Pen. Code, § 189*>**;**

<*Give element 3 if defendant did not personally commit or attempt felony.*>

[3. A perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____ <*insert felony or felonies from Pen. Code, § 189*>**;]**

(3/4). The commission [or attempted commission] of the _____ <*insert felony or felonies from Pen. Code, § 189*> **was a substantial factor in causing the death of another person;**

(4/5). The act causing the death and the _____ <*insert felony or felonies from Pen. Code, § 189*> **[or attempted** _____ <*insert felony or felonies from Pen. Code, § 189*>**] were part of one continuous transaction;**

AND

(5/6). There was a logical connection between the act causing the death and the _____ <*insert felony or felonies from*

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Pen. Code, § 189>**. The connection between the fatal act and the** _____ <*insert felony or felonies from Pen. Code, § 189*> **must involve more than just their occurrence at the same time and place.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ <*insert felony or felonies from Pen. Code, § 189*>**, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/ have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.**

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ <*insert felony or felonies from Pen. Code, § 189*> **before or at the time of the act causing the death.]**

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[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; see generally, *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [11 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1

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and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the

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committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

See the Bench Notes to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act* for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required. *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].

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- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.04, 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Second Degree Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at

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> least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act* and CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.

(New January 2006)

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541A. Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act

The defendant is charged [in Count ____] with murder, under a theory of felony murder.

To prove that the defendant is guilty of second degree murder under this theory, the People must prove that:

1. **The defendant committed [or attempted to commit] _____ <*insert inherently dangerous felony or felonies*>;**
2. **The defendant intended to commit _____ <*insert inherently dangerous felony or felonies*>;**
3. **The defendant did an act that caused the death of another person;**

AND

4. **The act causing the death and the _____ <*insert inherently dangerous felony or felonies*> [or attempted _____ <*insert inherently dangerous felony or felonies*>] were part of one continuous transaction.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ <*insert inherently dangerous felony or felonies*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved second degree murder under a theory of felony murder.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES ARE GIVEN.>

[The defendant must have intended to commit the (felony/felonies) of _____ <*insert inherently dangerous felony or felonies*> before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

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[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have intended to commit the felony."

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

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If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 541B, *Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 541C, *Felony Murder: Second Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

AUTHORITY

- Inherently Dangerous Felonies. People v. Satchell (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in

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People v. Flood (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].

- Specific Intent to Commit Felony Required. People v. Cavitt (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement. People v. Cavitt (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury. People v. Alvarez (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

RELATED ISSUES

Merger:* Ireland *Rule

Assault or assault with a deadly weapon cannot form the basis for a charge of second degree felony murder because the assaultive conduct "merges" with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [75 Cal.Rptr. 188, 450 P.2d 580] [merger based on assault with a deadly weapon]; see also *People v. Garrison* (1989) 47 Cal.3d 746, 778 [254 Cal.Rptr. 257, 765 P.2d 419] [first degree felony murder cannot be based on burglary where intent on entry is to commit assault].) The Supreme Court has emphasized that the purpose of the merger doctrine is to ensure that the judicially developed second degree felony-murder rule does not "subvert legislative intent" by elevating most felony assaults to murder without any inquiry into malice aforethought. (*People v. Ireland, supra,* 70

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Cal.2d at pp. 539–540; see *People v. Robertson* (2004) 34 Cal.4th 156, 170 [17 Cal.Rptr.3d 604, 95 P.3d 872].) In *People v. Robertson, supra,* 34 Cal.4th at p. 171, the Supreme Court discussed what standard the trial court should use to determine if the merger doctrine applies,

> In [*People v. Mattison* (1971) 4 Cal.3d 177, 185 [93 Cal.Rptr. 185, 481 P.2d 193]], we concluded that use of the second degree felony-murder rule was appropriate when the purpose of the predicate felony was independent of or collateral to an intent to cause injury that would result in death. Although the collateral purpose rationale may have its drawbacks in some situations [*People v. Hansen* (1994) 9 Cal.4th 300, 315 [36 Cal.Rptr.2d 609, 885 P.2d 1022]], we believe it provides the most appropriate framework to determine whether, under the facts of the present case, the trial court properly instructed the jury.

Previously, in *People v. Hansen, supra,* 9 Cal.4th at p. 315, the court stated,

> We decline . . . to adopt as the critical test determinative of merger in all cases the following language that appears in *Taylor* . . . "that the rationale for the merger doctrine does not encompass a felony committed with a collateral and independent felonious design." . . . Rather than rely upon a somewhat artificial test that may lead to an anomalous result, we focus upon the principles and rationale underlying the foregoing language in *Taylor*, namely, that with respect to certain inherently dangerous felonies, their use as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the legislative intent.

When determining whether the merger doctrine applies, the court should consider both of these standards.

Second Degree Felony Murder: Inherently Dangerous Felonies

The second degree felony-murder doctrine is triggered when a homicide occurs during the commission of a felony that is inherently dangerous to human life. (*People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361] and *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], both overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833 [201 Cal.Rptr. 319, 6788 P.2d 894], the court described an inherently dangerous felony as one that cannot be committed without creating a substantial risk that someone will

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be killed. However, in *People v. Patterson* (1989) 49 Cal.3d 615, 618, 626–627 [262 Cal.Rptr. 195, 778 P.2d 549], the court defined an inherently dangerous felony as "an offense carrying a high probability that death will result." (See *People v. Coleman* (1992) 5 Cal.App.4th 646, 649–650 [7 Cal.Rptr.2d 40] [court explicitly adopts *Patterson* definition of inherently dangerous felony].)

Whether a felony is inherently dangerous is a legal question for the court to determine. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 900–902 [13 Cal.Rptr.3d 442] [rule not changed by *Apprendi*].) In making this determination, the court should assess "the elements of the felony in the abstract, not the particular facts of the case," and consider the statutory definition of the felony in its entirety. (*People v. Satchell, supra,* 6 Cal.3d at p. 36; *People v. Henderson, supra,* 19 Cal.3d at pp. 93–94.) If the statute at issue prohibits a diverse range of conduct, the court must analyze whether the entire statute or only the part relating to the specific conduct at issue is applicable. (See *People v. Patterson, supra,* 49 Cal.3d at pp. 622–625 [analyzing Health & Saf. Code, § 11352, which prohibits range of drug-related behavior, and holding that only conduct at issue should be considered when determining dangerousness].)

The following felonies have been found inherently dangerous for purposes of second degree felony murder (but note that since Proposition 115 amended Penal Code section 189 in 1990, that code section includes kidnapping in its list of first degree felony murder felonies):

- Attempted Escape From Prison by Force or Violence. Pen. Code, § 4530; *People v. Lynn* (1971) 16 Cal.App.3d 259, 272 [94 Cal.Rptr. 492]; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143–1146 [256 Cal.Rptr. 601].
- Furnishing Poisonous Substance. Pen. Code, § 347; *People v. Mattison* (1971) 4 Cal.3d 177, 182–184 [93 Cal.Rptr. 185, 481 P.2d 193].
- Kidnapping for Ransom, Extortion, or Reward. Pen. Code, § 209(a); *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227–1228 [277 Cal.Rptr. 382].
- Manufacturing Methamphetamine. Health & Saf. Code, § 11379.6(a); *People v. James* (1998) 62 Cal.App.4th 244, 270–271 [74 Cal.Rptr.2d 7].
- Reckless Possession of Bomb. Pen. Code, § 12303.2; *People v. Morse* (1992) 2 Cal.App.4th 620, 646, 655 [3 Cal.Rptr.2d 343].

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- Shooting Firearm in Grossly Negligent Manner. Pen. Code, § 246.3; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 [92 Cal.Rptr.2d 727]; *People v. Robertson* (2004) 34 Cal.4th 156, 173 [17 Cal.Rptr.3d 604, 95 P.3d 872] [merger doctrine does not apply].
- Shooting at Inhabited Dwelling. Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9–10 [78 Cal.Rptr.2d 753].
- Shooting at Occupied Vehicle. Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 10–11 [78 Cal.Rptr.2d 753].
- Shooting From Vehicle at Inhabited Dwelling. *People v. Hansen* (1994) 9 Cal.4th 300, 311 [36 Cal.Rptr.2d 609, 885 P.2d 1022].

The following felonies have been found to be *not* inherently dangerous for purposes of second degree felony murder:

- Conspiracy to Possess Methedrine. *People v. Williams* (1965) 63 Cal.2d 452, 458 [47 Cal.Rptr. 7, 406 P.2d 647].
- Driving with Willful or Wanton Disregard for Safety While Fleeing a Pursuing Officer. *People v. Howard* (2005) 34 Cal.4th 1129, 1138 [23 Cal.Rptr.3d 306].
- Extortion. Pen. Code, §§ 518, 519; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237–1238 [72 Cal.Rptr.2d 918].
- False Imprisonment. Pen. Code, § 236; *People v. Henderson* (1977) 19 Cal.3d 86, 92–96 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Felon in Possession of Firearm. Pen. Code, § 12021; *People v. Satchell* (1971) 6 Cal.3d 28, 39–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Felonious Practice of Medicine Without License. People v. Burroughs (1984) 35 Cal.3d 824, 830–833 [201 Cal.Rptr. 319, 678 P.2d 894].
- Felony Child Abuse. Pen. Code, § 273a; *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228 [286 Cal.Rptr. 117].
- Felony Escape From Prison Without Force or Violence. Pen. Code, § 4530(b); *People v. Lopez* (1971) 6 Cal.3d 45, 51–52 [98 Cal.Rptr. 44, 489 P.2d 1372].
- Felony Evasion of Peace Officer Causing Injury or Death. Veh. Code, § 2800.3; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 979–980 [103 Cal.Rptr.2d 809].

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- Furnishing PCP. Health & Saf. Code, § 11379.5; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1100–1101 [8 Cal.Rptr.2d 439].
- Grand Theft Under False Pretenses. *People v. Phillips* (1966) 64 Cal.2d 574 [51 Cal.Rptr. 225, 414 P.2d 353], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Grand Theft From the Person. Pen. Code, § 487(c); *People v. Morales* (1975) 49 Cal.App.3d 134, 142–143 [122 Cal.Rptr. 157].

See the Related Issues section of CACLRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act.*

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541B. Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act

<Give the following introductory sentence when not giving Instruction 541A.>

[The defendant is charged [in Count ____] with murder, under a theory of felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of second degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert inherently dangerous felony or felonies>***;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert inherently dangerous felony or felonies>***;**
3. **The perpetrator committed [or attempted to commit]** _____ *<insert inherently dangerous felony or felonies>***;**
4. **The perpetrator did an act that caused the death of another person;**

[AND]

5. **The act causing the death and the** _____ *<insert inherently dangerous felony or felonies>* **[or attempted** _____ *<insert inherently dangerous felony or felonies>***] were part of one continuous transaction(;/.)**

<Give element 6 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>

[AND

6. **There was a logical connection between the act causing the death and the** _____ *<insert inherently dangerous felony*

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or felonies>. **The connection between the fatal act and the** _____ <*insert inherently dangerous felony or felonies*> **must involve more than just their occurrence at the same time and place.]**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ <*insert inherently dangerous felony or felonies*>**, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/ have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved second degree murder under a theory of felony murder.**

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ <*insert inherently dangerous felony or felonies*> **before or at the time of the act causing the death.]**

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the underlying (felony/felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time

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and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give the bracketed element 6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [45 Cal.Rptr.2d 121, 287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [267 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

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The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined.*

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

If the prosecution alleges that the defendant committed the fatal act, give CALCRIM No. 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 541C, *Felony Murder: Second Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed,

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however, under the provocative act doctrine. (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

Related Instructions

CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles*.

CALCRIM No. 415 et seq., *Conspiracy*.

AUTHORITY

- Inherently Dangerous Felonies. *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required. *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 22].
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 22].
- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 22].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 80, 87; Crimes Against the Person, §§ 134–147, 156.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Second Degree Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act* and CALCRIM No. 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.*

(New January 2006)

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541C. Felony Murder: Second Degree—Other Acts Allegedly Caused Death

The defendant is charged [in Count ____] with murder, under a theory of felony murder.

The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of second degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ <*insert inherently dangerous felony or felonies*>**;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ <*insert inherently dangerous felony or felonies*>**;**

<*Give element 3 if defendant did not personally commit or attempt felony.*>

[3. The perpetrator committed [or attempted to commit] _____ <*insert inherently dangerous felony or felonies*>**;]**

(3/4). The commission [or attempted commission of] the _____ <*insert inherently dangerous felony or felonies*> **caused the death of another person;**

(4/5). The act causing the death and the _____ <*insert inherently dangerous felony or felonies*> **[or attempted** _____ <*insert inherently dangerous felony or felonies*>**] were part of one continuous transaction;**

AND

(5/6). There was a logical connection between the act causing the death and the _____ <*insert inherently dangerous felony or felonies*>**. The connection between the fatal act and the** _____ <*insert inherently dangerous felony or*

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felonies> **must involve more than just their occurrence at the same time and place.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ <*insert inherently dangerous felony or felonies*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/ have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved second degree murder under a theory of felony murder.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aided and abetted[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ <*insert inherently dangerous felony or felonies*> before or at the time of the act causing the death.]

[It is not required that the person die immediately, as long as the act causing the death and the (felony/felonies) are part of one continuous transaction.]

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor.

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However, it does not need to be the only factor that causes the death.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies.]

[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874 [11 Cal.Rptr.2d, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of an instruction on the underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed

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element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may [also] be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of an instruction on the underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit."

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.2d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined.*

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the

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prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

See the Bench Notes to CALCRIM No. 541B, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act* for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

- Inherently Dangerous Felonies. *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required. *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.2d 281, 91 P.3d 222].
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.2d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.2d 281, 91 P.3d 222].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].

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- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.04, 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were

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> present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*; CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*; and 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act*.

(New January 2006)

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548. Murder: Alternative Theories

The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.

Each theory of murder has different requirements, and I will instruct you on both.

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory.

BENCH NOTES

Instructional Duty

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories. This instruction should be given after the court has given any applicable instructions on defenses to homicide and **before** CALCRIM No. 520, *Murder With Malice Aforethought*.

If there is evidence of multiple acts from which the jury might conclude that the defendant killed the decedent, the court may be required to give CALCRIM No. 3500, *Unanimity*. (See *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300–302 [209 Cal.Rpt. 503] [error not to instruct on unanimity where evidence that the victim was killed either by blunt force or by injection of cocaine].) Review the Bench Notes for CALCRIM No. 3500 discussing when a unanimity instruction is required.

(New January 2006)

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549. Felony Murder: One Continuous Transaction—Defined

In order for the People to prove that the defendant is guilty of murder under a theory of felony murder [and that the special circumstance of murder committed while engaged in the commission of _____ <*insert felony*> is true], the People must prove that the _____ <*insert felony*> [or attempted _____ <*insert felony*>] and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location.

In deciding whether the act causing the death and the felony were part of *one continuous transaction,* you may consider the following factors:

1. **Whether the felony and the fatal act occurred at the same place;**
2. **The time period, if any, between the felony and the fatal act;**
3. **Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony;**
4. **Whether the fatal act occurred after the felony but while [one or more of] the perpetrator[s] continued to exercise control over the person who was the target of the felony;**
5. **Whether the fatal act occurred while the perpetrator[s] (was/were) fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime;**
6. **Whether the felony was the direct cause of the death;**

AND

7. **Whether the death was a natural and probable consequence of the felony.**

It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction.

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BENCH NOTES

Instructional Duty

In *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222], the court stated that "there is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction." If the evidence raises an issue of whether the felony and the homicide were part of one continuous transaction, give this instruction.

The court **must** also give the appropriate felony-murder instructions explaining the elements of the underlying offense.

AUTHORITY

- Continuous Transaction. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Hart* (1999) 20 Cal.4th 546, 608–609 [85 Cal.Rptr.2d 132, 976 P.2d 683]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016 [248 Cal.Rptr. 568, 755 P.2d 1017]; *People v. Hernandez* (1988) 47 Cal.3d 315, 346 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 210 [82 Cal.Rptr. 598]; *People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [32 Cal.Rptr. 199, 383 P.2d 783].
- Continuous Control of Victim. *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857] [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [23 Cal.Rptr.2d 888] [robbery].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][b][iv], [v] (Matthew Bender).

RELATED ISSUES

It is error to remove from the jury the factual question of whether the felony and the homicide are parts of a single "continuous transaction."

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(*People v. Sakarias* (2000) 22 Cal.4th 596, 623–625 [94 Cal.Rptr.2d 17, 955 P.2d 152].)

(New January 2006)

550–559. Reserved for Future Use

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E. ALTERNATE THEORIES OF LIABILITY

560. Homicide: Provocative Act by Defendant

[The defendant is charged [in Count ____] with _____ <*insert underlying crime*>.] The defendant is [also] charged [in Count ____] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.

To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

1. **In (committing/ [or] attempting to commit) _____ <*insert underlying crime*>, the defendant intentionally did a provocative act;**
2. **The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;**
3. **In response to the defendant's provocative act, _____ <*insert name or description of third party*> killed _____ <*insert name of decedent*>;**

AND

4. **_____'s <*insert name of decedent*> death was the natural and probable consequence of the defendant's provocative act.**

A *provocative act* is an act:

1. **[That goes beyond what is necessary to accomplish the _____ <*insert underlying crime*>;]**

[AND

2.**] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.**

In order to prove that _____'s <*insert name of decedent*> death was the *natural and probable consequence* of the defendant's provocative act, the People must prove that:

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1. **A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death;**
2. **The defendant's act was a direct and substantial factor in causing _____'s** *insert name of decedent*> **death;**

AND

3. **_____'s** <*insert name of decedent*> **death would not have happened if the defendant had not committed the provocative act.**

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

<*Multiple Provocative Acts*>

[The People alleged that the defendant committed the following provocative acts: _____ <*insert acts alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts. However, you do not all need to agree on which act.]**

<*Independent Criminal Act*>

[A defendant is not guilty of murder if the killing of _____ <*insert name of decedent*> **was caused solely by the independent criminal act of someone else. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]**

<*Degree of Murder*>

[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.

To prove that the defendant is guilty of first degree murder, the People must prove that:

1. **As a result of the defendant's provocative act, _____** <*insert name of decedent*> **was killed during the commission of _____** <*insert Pen. Code, § 189 felony*>**;**

AND

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2. Defendant intended to commit _____ <*insert Pen. Code, § 189 felony*> when (he/she) did the provocative act.

In deciding whether the defendant intended to commit _____ <*insert Pen. Code, § 189 felony*> and whether the death occurred during the commission of _____ <*insert Pen. Code, § 189 felony*>, you should refer to the instructions I have given you on _____ <*insert Pen. Code, § 189 felony*>.

Any murder that does not meet these requirements for first degree murder is second degree murder.]

[If you decide that the defendant committed murder, that crime is murder in the second degree.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a **sua sponte** duty to give instructions relating to the underlying felony, whether or not it is separately charged.

If the defendant is an accomplice, aider and abettor, or coconspirator of the person who did the provocative act, give CALCRIM No. 561, *Homicide: Provocative Act by Accomplice*, instead of this instruction.

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

In the definition of "provocative act," the court should always give the bracketed phrase that begins, "that goes beyond what is necessary," unless the court determines that this element is not required because the underlying felony includes malice as an element. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [212 Cal.Rptr. 868].) See discussion in the Related Issues section below.

If the evidence suggests that there is more than one provocative act, give the bracketed paragraph on "multiple provocative acts," which instructs the

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jury that they need not unanimously agree about which provocative act caused the killing. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph that begins with "A defendant is not guilty of murder if . . . ." (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [11 Cal.Rptr.2d 148, 29 P.3d 225].)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed sentence of the instruction. As an alternative, the court may omit all instructions relating to the degree and secure a stipulation that if a guilty verdict is returned, the degree of murder is set at second degree. If the prosecution is seeking a first degree murder conviction, give the bracketed section on "degree of murder."

AUTHORITY

- Provocative Act Doctrine. *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461 [63 Cal.Rptr.2d 382].
- Felony-Murder Rule Invoked to Determine Degree. *People v. Gilbert* (1965) 63 Cal.2d 690, 705 [47 Cal.Rptr. 909, 408 P.2d 365]; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 139, fn. 4 [145 Cal.Rptr. 524, 577 P.2d 659]; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2 [203 Cal.Rptr. 433, 681 P.2d 274].
- Independent Intervening Act by Third Person. *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [11 Cal.Rptr.2d 148, 29 P.3d 225].
- Natural and Probable Consequences Doctrine. *People v. Gardner* (1995) 37 Cal.App.4th 473, 479 [43 Cal.Rptr.2d 603].
- Response of Third Party Need Not Be Reasonable. *People v. Gardner* (1995) 37 Cal.App.4th 473, 482 [43 Cal.Rptr.2d 603].
- Unanimity on Which Act Constitutes Provocative Act is Not Required. *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401] [multiple provocative acts].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 147–155.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01[1][a], [2][c] (Matthew Bender).

RELATED ISSUES

Act "Beyond What is Necessary"

The general rule that has arisen in the context of robbery cases is that the provocative act must be one that goes beyond what is necessary to accomplish the underlying felony. However, more recent cases make clear that this requirement is not universal. In attempted murder or assault with a deadly weapon cases, the crime itself may be a provocative act because it demonstrates either express or implied malice. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [21 Cal.Rptr. 868]; see *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659].)

Death of a Fetus

The California Supreme Court has declined to decide whether the felony-murder doctrine could constitutionally apply to the death of a fetus that did not result from a direct attack on the mother. (*People v. Davis* (1994) 7 Cal.4th 797, 810, fn. 2 [30 Cal.Rptr.2d 50, 872 P.2d 591].) That ambiguity could extend to the provocative act doctrine as well.

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561. Homicide: Provocative Act by Accomplice

[The defendant is charged [in Count ____] with _____ <*insert underlying crime*>.] The defendant is [also] charged [in Count ____] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.

To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

1. **The defendant was an accomplice of _____ <*insert name[s] or description[s] of alleged provocateur[s]*> in (committing/ [or] attempting to commit) _____ <*insert underlying crime*>;**
2. **In (committing/ [or] attempting to commit) _____ <*insert underlying crime*>, _____ <*insert name[s] or description[s] of alleged provocateur[s]*> intentionally did a provocative act;**
3. **_____ <*insert name[s] or description[s] of alleged provocateur[s]*> knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;**
4. **In response to _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act, _____ <*insert name or description of third party*> killed _____ <*insert name of decedent*>;**

AND

5. **_____'s <*insert name of decedent*> death was the natural and probable consequence of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act.**

A *provocative act* is an act:

1. **[That goes beyond what is necessary to accomplish the _____ <*insert underlying crime*>;]**

[AND

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2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

The defendant is an *accomplice* of _____ <*insert name[s] or description[s] of alleged provocateur[s]*> if the defendant is subject to prosecution for the identical offense that you conclude _____ <*insert name[s] or description[s] of alleged provocateur[s]*> (committed/ [or] attempted to commit). The defendant is subject to prosecution if (he/she) (committed/ [or] attempted to commit) the crime or if:

1. **(He/She) knew of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> criminal purpose to commit _____ <*insert underlying crime*>;**

AND

2. **The defendant intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of _____ <*insert underlying crime*>/ [or] participate in a criminal conspiracy to commit _____ <*insert underlying crime*>).**

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

In order to prove that _____'s <*insert name of decedent*> death was the *natural and probable consequence* of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act, the People must prove that:

1. **A reasonable person in _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> position would have foreseen that there was a high probability that (his/ her/their) act could begin a chain of events resulting in someone's death;**
2. **_____'s <*insert name[s] or description[s] of alleged provocateur[s]*> act was a direct and substantial factor in causing _____'s <*insert name of decedent*> death;**

AND

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3. _____'s <*insert name or description of decedent*> **death would not have happened if _____** <*insert name[s] or description[s] of alleged provocateur[s]*> **had not committed the provocative act.**

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

<*Multiple Provocative Acts*>

[The People alleged the following provocative acts: _____ <*insert acts alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that:**

1. _____ <*insert name[s] or description[s] of alleged provocateur[s]*> **committed at least one provocative act;**

AND

2. At least one of the provocative acts committed by _____ <*insert name[s] or description[s] of alleged provocateur[s]*> **was a direct and substantial factor that caused the killing.**

However, you do not all need to agree on which provocative act has been proved.]

<*Accomplice Deceased*>

[If you decide that the only provocative act that caused _____'s <*insert name of deceased accomplice*> **death was committed by _____** <*insert name of deceased accomplice*>**, then the defendant is not guilty of _____'s** <*insert name of deceased accomplice*> **murder.]**

<*Independent Criminal Act*>

[A defendant is not guilty of murder if the killing of _____ <*insert name or description of decedent*> **was caused solely by the independent criminal act of someone other than the defendant or _____** <*insert name[s] or description[s] of all alleged accomplice[s]*>**. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]**

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<Degree of Murder>

[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.

To prove that the defendant is guilty of first degree murder, the People must prove that:

1. **As a result of _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, _____** *<insert name of decedent>* **was killed while _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **(was/were) committing _____** *<insert Pen. Code, § 189 felony>***;**

AND

2. **_____** *<insert name[s] or description[s] of alleged provocateur[s]>* **specifically intended to commit _____** *<insert Pen. Code, § 189 felony>* **when (he/she/they) did the provocative act.**

In deciding whether _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **intended to commit _____** *<insert Pen. Code, § 189 felony>* **and whether the death occurred during the commission of _____** *<insert Pen. Code, § 189 felony>***, you should refer to the instructions I have given you on _____** *<insert Pen. Code, § 189 felony>*.

Any murder that does not meet these requirements for first degree murder is second degree murder.]

[If you decide that the defendant committed murder, that crime is murder in the second degree.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a

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sua sponte duty to give instructions relating to the underlying felony, whether or not it is separately charged.

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

In the definition of "provocative act," the court should always give the bracketed phrase that begins, **"**that goes beyond what is necessary," unless the court determines that this element is not required because the underlying felony includes malice as an element. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [21 Cal.Rptr. 868].) See discussion in the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

In the paragraph that begins with "An accomplice does not need to be present," use the bracketed phrase "will be committed or" if appropriate under the facts of the case.

If a deceased accomplice participated in provocative acts leading to his or her own death, give the bracketed sentence that begins, "If you decide that the only provocative act that caused . . . ." (See *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330 [82 Cal.Rptr.2d 254]; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 846 [68 Cal.Rptr.2d 388]; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583–584 [91 Cal.Rptr. 275, 477 P.2d 131]; *People v. Antick* (1975) 15 Cal.3d 79, 90 [123 Cal.Rptr. 475, 539 P.2d 43], disapproved on other grounds in *People v. McCoy* (20010 25 Cal.4th 1111, 1123 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph that begins, "A defendant is not guilty of murder if . . . ." (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].)

If the evidence suggests that there is more than one provocative act, give the bracketed section on "Multiple Provocative Acts." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed sentence of the instruction. As an alternative, the court may omit all instructions relating to the degree and secure a stipulation that if a murder verdict is returned, the degree of murder is set at second degree. If the prosecution is seeking a first degree murder conviction, give the bracketed section on "degree of murder."

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AUTHORITY

- Provocative Act Doctrine. *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461 [63 Cal.Rptr.2d 382].
- Felony-Murder Rule Invoked to Determine Degree. *People v. Gilbert* (1965) 63 Cal.2d 690, 705 [47 Cal.Rptr. 909, 408 P.2d 365]; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 139, fn. 4 [145 Cal.Rptr. 524, 577 P.2d 659]; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2 [203 Cal.Rptr. 433, 681 P.2d 274].
- Independent Intervening Act by Third Person. *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Natural and Probable Consequences Doctrine. *People v. Gardner* (1995) 37 Cal.App.4th 473, 479 [43 Cal.Rptr.2d 603].
- Response of Third Party Need Not Be Reasonable. *People v. Gardner* (1995) 37 Cal.App.4th 473, 482 [43 Cal.Rptr.2d 603].
- Unanimity on Which Act Constitutes Provocative Act Is Not Required. *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401] [multiple provocative acts].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 147–155.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.04, 140.10, Ch. 142, *Crimes Against the Person,* § 142.01[1][a], [2][c] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

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562. Transferred Intent

<A. Only unintended victim is killed.>

[If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed.]

<B. Both intended and unintended victims are killed.>

[If the defendant intended to kill one person, but by mistake or accident also killed someone else, then the crime, if any, is the same for the unintended killing as it is for the intended killing.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if transferred intent is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].)

Give optional paragraph A if only an unintended victim is killed. Give optional paragraph B if both the intended victim and an unintended victim or victims are killed. (See discussion in Commentary, below.)

Any defenses that apply to the intended killing apply to the unintended killing as well. (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628].) This includes defenses that decrease the level of culpable homicide such as heat of passion or imperfect self-defense.

Do not give this instruction for a charge of attempted murder. The transferred intent doctrine does not apply to attempted murder. A defendant's guilt of attempted murder must be judged separately for each alleged victim. (*People v. Bland* (2002) 28 Cal.4th 313, 327–328, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107]; see CALCRIM No. 600, *Attempted Murder*.)

Related Instructions

Always give the appropriate related homicide instructions.

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AUTHORITY

- Common Law Doctrine of Transferred Intent. *People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 13–15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[2][b][vii] (Matthew Bender).

COMMENTARY

Intent Transfers to Unintended Victim

"[A] person's intent to kill the intended target is not 'used up' once it is employed to convict the person of murdering that target. It can also be used to convict of the murder of others the person also killed. . . . [A]ssuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree. . . . Intent to kill transfers to an unintended homicide victim even if the intended target is killed." (*People v. Bland* (2002) 28 Cal.4th 313, 322, 323–324, 326 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [disapproving *People v. Birreuta* (1984) 162 Cal.App.3d 454, 458, 463 [208 Cal.Rptr. 635]].)

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563. Conspiracy to Commit Murder

(The defendant[s]/Defendant[s] _____ <*insert name[s]*>) (is/are) charged [in Count ____] with conspiracy to commit murder.

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

1. **The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] _____ <*insert name[s] or description[s] of coparticipant[s]*>) to intentionally and unlawfully kill;**
2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill;**
3. **(The/One of the) defendant[s][,] [or _____ <*insert name[s] or description[s] of coparticipant[s]*>][,] [or (both/all) of them] committed [at least one of] the following overt act[s] alleged to accomplish the killing: _____ <*insert the alleged overt acts*>;**

AND

4. **[At least one of these/This] overt act[s] was committed in California.**

To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the overt act[s].

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit murder, please refer to Instructions ____, which define that crime.

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

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An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) Use this instruction only if the defendant is charged with conspiracy to commit murder. If the defendant is charged with conspiracy to commit another crime, give CALCRIM No. 415, *Conspiracy*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give either instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18

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Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of murder.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with "You must all agree that at least one overt act alleged" if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].)

Give the bracketed sentence that begins with "You must make a separate decision," if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with "A member of a conspiracy does not have to personally know," on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 1500, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawl From Conspiracy*.

If the case involves an issue regarding the statute of limitations or evidence of withdrawl by the defendant, a unanimity instruction may be required. (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also Related Issues section to CALCRIM No. 415, *Conspiracy*, and CALCRIM 3500, *Unanimity*.)

Related Instructions

CALCRIM No. 415, *Conspiracy*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

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AUTHORITY

- Elements. Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined. Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75].
- Elements of Underlying Offense. *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Express Malice Murder. *People v. Swain* (1996) 12 Cal.4th 593, 602–603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].
- Premeditated First Degree Murder. *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Two Specific Intents for Conspiracy. *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved by *People v.* Cortez (1998) 18 Cal.4th 1223 [77 Cal.Rptr.2d 733, 960 P.2d 537] to the extent it suggests instructions on premeditation and deliberation must be given in every conspiracy to murder case.
- Unanimity on Specific Overt Act Not Required. *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 77, 78.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.01[2], 141.02[3], [4][b], [5][c], Ch. 142, *Crimes Against the Person,* § 142.01[2][e] (Matthew Bender).

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as "persons unknown." (*People v. Sacramento Butchers' Protective Association* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein,

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California Criminal Law (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

Conspiracy to commit murder cannot be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602–603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr. 2d 733, 960 P.2d 537].)

LESSER INCLUDED OFFENSES

There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79 [116 Cal.Rptr.2d 634].)

RELATED ISSUES

Multiple Conspiracies

Separately planned murders are punishable as separate conspiracies, even if the separate murders are incidental to a single objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133 [54 Cal.Rptr.2d 578].)

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

(Revised August 2006)

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F. MANSLAUGHTER

(i) Voluntary

570. Voluntary Manslaughter: Heat of Passion—Lesser Included Offense

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A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

1. **The defendant was provoked;**
2. **As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;**

AND

3. **The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.**

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of

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average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.

[If enough time passed between the provocation and the killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

Related Instructions

CALCRIM No. 511, *Excusable Homicide: Accident in the Heat of Passion.*

AUTHORITY

- Elements. Pen. Code, § 192(a).
- Heat of Passion Defined. *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1]; *People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 207–219.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter. *People v. Von Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rtpr.2d 553].)

RELATED ISSUES

Heat of Passion: Sufficiency of Provocation—Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [230 Cal.Rptr. 86]); a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211 [139 P. 989]); verbal taunts by an unfaithful wife (*People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777]); and the infidelity of a lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329 [325 P.2d 97]).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721,739 [64 Cal.Rptr.2d 282]); insulting words or gestures (*People v. Odell David Dixon* (1961) 192 Cal.App.2d 88, 91 [13 Cal.Rptr. 277]); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555–1556 [38 Cal.Rptr.2d 859]); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510, 775 P.2d 960]); the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [54 Cal.Rptr.2d 608,]); and a long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246–1247 [7 Cal.Rptr.3d 401]). In addition the Supreme Court has suggested that mere vandalism of an automobile is

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insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3 [30 Cal.Rptr.2d 33, 872, P.2d 574].)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be "any violent, intense, high-wrought or enthusiastic emotion." (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Heat of Passion: Defendant Initial Aggressor

"[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force." (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1312–1313 [7 Cal.Rptr.3d 161].)

Heat of Passion: Defendant's Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1] [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377 [202 P.2d 18]; *People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777].) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant's "extraordinary character and environmental deficiencies." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [120 Cal.Rptr.2d 432, 47 P.3d 225] [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation and heat of passion that is insufficient to reduce a murder to manslaughter may nonetheless reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about the idea of premeditation or deliberation].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32–33 [60

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Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid*.)

(New January 2006)

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571. Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense

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A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

1. **The defendant actually believed that (he/she/ [or] someone else/_____ <*insert name of third party*>) was in imminent danger of being killed or suffering great bodily injury;**

AND

2. **The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;**

BUT

3. **At least one of those beliefs was unreasonable.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

[If you find that _____ <*insert name of decedent/victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]

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[If you find that the defendant knew that _____ <*insert name of decedent/victim*> had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of decedent/victim*>, you may consider that threat in evaluating the defendant's beliefs.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part by *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People*

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v. Rodriguez disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

In evaluating whether the defendant actually believed in the need for self-defense, the jury may consider the effect of antecedent threats and assaults against the defendant, including threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337].) If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults on request.

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

AUTHORITY

- Elements. Pen. Code, § 192(a).
- Imperfect Self-Defense Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. *People v. Michaels* (2002) 28 Cal.4th 486, 529–531 [122 Cal.Rptr.2d 285, 49 P.3d 1032].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 210.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[1][c], [2][a] (Matthew Bender).

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter. *People v. Von Ronk* (1985) 171 Cal.App.3d 818, 822 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

RELATED ISSUES

Battered Woman's Syndrome

Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].)

Blakeley *Not Retroactive*

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra,* 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. "Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of

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imperfect self-defense, offered to negate malice, is likewise irrelevant." (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523]; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid.*)

See also the Related Issues Section to CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another.*

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

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572. Voluntary Manslaughter: Murder Not Charged

The defendant is charged [in Count ____] with voluntary manslaughter.

To prove that the defendant is guilty of voluntary manslaughter, the People must prove that:

1. **The defendant committed an act that caused the death of another person;**

[AND]

2. **When the defendant acted, (he/she) unlawfully intended to kill someone(;/.)**

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. **(He/She) killed without lawful excuse or justification.]**

Or the People must prove that:

1. **The defendant intentionally committed an act that caused the death of another person;**
2. **The natural consequences of the act were dangerous to human life;**
3. **At the time (he/she) acted, (he/she) knew the act was dangerous to human life;**

[AND]

4. **(He/She) deliberately acted with conscious disregard for human life(;/.)**

<Give element 5 when instructing on self-defense or defense of another>

[AND

5. **(He/She) killed without lawful excuse or justification.]**

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is

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one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court should give this instruction **only** in cases where voluntary manslaughter is charged alone, without murder. In such cases,

> [A] conviction of voluntary manslaughter may be sustained upon proof and findings that the defendant committed an unlawful and intentional homicide. Provocation and imperfect self-defense are not additional elements of voluntary manslaughter which must be proved and found beyond reasonable doubt in order to permit a conviction of that offense.

(*People v. Rios* (2000) 23 Cal.4th 450, 463, 469 [97 Cal.Rptr.2d 512, 2 P.3d 1066].) "[V]oluntary manslaughter . . . is *also* committed when one kills unlawfully, and with *conscious disregard for life*." (*People v. Rios, supra*, 23 Cal.4th at p. 461, fn. 7 [emphasis in original], citing *People v. Blakeley* (2000) 23 Cal.4th 82, 90–91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. Lasko* (2000) 23 Cal.4th 101, 108–110 [96 Cal.Rptr.2d 441, 999 P.2d 666].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See

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People v. Autry (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) See also CALCRIM No. 620, *Causation: Special Issues*.

AUTHORITY

- Elements. Pen. Code § 192(a); *People v. Rios* (2000) 23 Cal.4th 450, 463, 469 [97 Cal.Rptr.2d 512, 2 P.3d 1066].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 208–209.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [e], [f], [2][a] (Matthew Bender).

RELATED ISSUES

Blakeley *Not Retroactive*

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra,* 23 Cal.4th at p. 93.) In such cases, do not give the portion of the instruction that begins, "Or the People must prove that" or any of the elements that follow.

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched

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the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid.*)

(New January 2006)

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(ii) Involuntary

580. Involuntary Manslaughter: Lesser Included Offense

When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.

The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

The defendant committed involuntary manslaughter if:

1. **The defendant (committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence);**

AND

2. **The defendant's acts unlawfully caused the death of another person.**

[The People allege that the defendant committed the following crime[s]: _____ <*insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)***>.**

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/ felonies)***>.]**

[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____ <*insert act[s] alleged***>.]**

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[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]

In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the

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defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [280 Cal.Rptr. 609], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [97 Cal.Rptr.2d 512, 2 P.3d 1066].)

When instructing on involuntary manslaughter as a lesser offense, the court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 2, instruct on either or both of theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [97 Cal.Rptr.2d 512, 2 P.3d 1066].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [43 Cal.Rptr.2d 135].) See also CALCRIM No. 620, *Causation: Special Issues*.

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In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

AUTHORITY

- Involuntary Manslaughter Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 673 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.02[4], 140.04, Ch. 142, *Crimes Against*

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the Person, §§ 142.01[3][d.1], [e], 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

Involuntary manslaughter is a lesser included offense of both degrees of murder, but it is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798]; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [142 Cal.Rptr. 664].)

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a "mitigating circumstance" that "reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide." (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675] [discussing dissenting opinion of Mosk, J.].) In such a situation, the court should also instruct the jury in involuntary manslaughter.

See also the Related Issues section to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged.*

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581. Involuntary Manslaughter: Murder Not Charged

The defendant is charged [in Count ____] with involuntary manslaughter.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence);**

AND

2. **The defendant's acts caused the death of another person.**

[The People allege that the defendant committed the following crime[s]: _____ <*insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)***>.**

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/ felonies)***>.]**

[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____ <*insert act[s] alleged***>.]**

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act

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amounts to disregard for human life or indifference to the consequences of that act.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree on which act (he/she) committed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the offense.

The court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 1, instruct on either or both theories of involuntary manslaughter as appropriate.

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The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

AUTHORITY

- Involuntary Manslaughter Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].

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- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

RELATED ISSUES

Due Caution and Circumspection

"The words lack of 'due caution and circumspection' have been heretofore held to be the equivalent of 'criminal negligence.' " (*People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926].)

Felonies as Predicate "Unlawful Act"

"[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675] [practicing medicine without a license cannot be predicate offense for second degree murder because not inherently dangerous but can be for

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involuntary manslaughter even though Penal Code section 192 specifies an "unlawful act, not amounting to a felony"].)

No Inherently Dangerous Requirement for Predicate Misdemeanor/ Infraction

"[T]he offense which constitutes the 'unlawful act' need not be an inherently dangerous misdemeanor or infraction. Rather, to be an 'unlawful act' within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so." (*People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].)

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid.*)

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582. Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged

The defendant is charged [in Count ____] with involuntary manslaughter based on failure to perform a legal duty.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had a legal duty to _____ <*insert name of decedent*>;**
2. **The defendant failed to perform that legal duty;**
3. **The defendant's failure was criminally negligent;**

AND

4. **The defendant's failure caused the death of _____ <*insert name of decedent*>.**

(A/An) _____ <*insert description of person owing duty*> has a legal duty to (help/care for/rescue/warn/maintain the property of/_____ <*insert other required action[s]*>) _____ <*insert description of decedent, not name*>.

Criminal negligence **involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:**

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

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[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death, only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Legal Duty

The existence of a legal duty is a matter of law to be decided by the judge. (*Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rtpr.2d 756, 927 P.2d 1260]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 [211 Cal.Rptr. 356, 695 P.2d 653].) The court should instruct the jury if a legal duty exists. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 614 [140 Cal.Rptr. 282] [proper instruction that parent has legal duty to furnish necessary clothing, food, and medical attention for his or her minor child].) In the instruction on legal duty, the court should use generic terms to describe the relationship and duty owed. For example:

> A parent has a legal duty to care for a child.
>
> A paid caretaker has a legal duty to care for the person he or she was hired to care for.
>
> A person who has assumed responsibility for another person has a legal duty to care for that other person.

The court should not state "the defendant had a legal duty to the decedent." (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250

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Cal.Rptr. 604, 758 P.2d 1135] [correct to state "a Garden Grove Regular Police Officer [is a] peace officer"; would be error to state "Officer Reed was a peace officer"].)

However, in a small number of cases where the legal duty to act is based on the defendant having created or increased risk to the victim, the existence of the legal duty may depend on facts in dispute. (See *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].) If there is a conflict in testimony over the facts necessary to establish that the defendant owed a legal duty to the victim, then the issue must be submitted to the jury. In such cases, the court should insert a section similar to the following:

> **The People must prove that the defendant had a legal duty to (help/rescue/warn/_____ <*insert other required action[s]*>) _____ <*insert name of decedent*>.**
>
> **In order to prove that the defendant had this legal duty, the People must prove that the defendant _____ <*insert facts that establish legal duty*>.**
>
> **If you decide that the People have proved that the defendant _____ <*insert facts that establish legal duty*>, then the defendant had a legal duty to (help/rescue/warn/_____ <*insert other required action[s]*> _____ <*insert name of decedent*>.**
>
> **If you have a reasonable doubt whether the defendant _____ <*insert facts that establish legal duty*>, then you must find (him/her) not guilty.**

AUTHORITY

- Elements. Pen. Code, § 192(b); *People v. Oliver* (1989) 210 Cal.App.3d 138, 146 [258 Cal.Rptr. 138].
- Criminal Negligence. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Duty. *People v. Heitzman* (1994) 9 Cal.4th 189, 198–199 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].
- Causation. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 232–234.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.03, 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[2][b] (Matthew Bender).

RELATED ISSUES

Legal Duty to Aid

In *People v. Oliver* (1989) 210 Cal.App.3d 138, 147 [258 Cal.Rptr. 138], the court explained the requirement of a legal duty to act as follows:

> A necessary element of negligence, whether criminal or civil, is a duty owed to the person injured and a breach of that duty. . . . Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty . . . . In California civil cases, courts have found a special relationship giving rise to an affirmative duty to act where some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency relationship inducing reliance or preventing assistance from others. . . . Where, however, the defendant took no affirmative action which contributed to, increased, or changed the risk which would otherwise have existed, and did not voluntarily assume any responsibility to protect the person or induce a false sense of security, courts have refused to find a special relationship giving rise to a duty to act.

Duty Based on Dependency/Voluntary Assumption of Responsibility

A legal duty to act exists when the defendant is a caretaker or has voluntarily assumed responsibility for the victim. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 134–138 [253 Cal.Rptr. 1, 763 P.2d 852] [parent to child]; *People v. Montecino* (1944) 66 Cal.App.2d 85, 100 [152 P.2d 5] [contracted caretaker to dependent].)

Duty Based on Conduct Creating or Increasing Risk

A legal duty to act may also exist where the defendant's behavior created or substantially increased the risk of harm to the victim, either by creating

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the dangerous situation or by preventing others from rendering aid. (*People v. Oliver* (1989) 210 Cal.App.3d 138, 147–148 [258 Cal.Rptr. 138] [defendant had duty to act where she drove victim to her home knowing he was drunk, knowingly allowed him to use her bathroom to ingest additional drugs, and watched him collapse on the floor]; *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456 [30 Cal.Rptr.2d 681] [defendant had duty to prevent horses from running onto adjacent freeway creating risk].)

(New January 2006)

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(iii) Vehicular

590. Gross Vehicular Manslaughter While Intoxicated

The defendant is charged [in Count ____] with gross vehicular manslaughter while intoxicated.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/operated a vessel under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/operated a vessel while having a blood alcohol level of 0.08 or higher);**
2. **While (driving that vehicle/operating that vessel) under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug], the defendant also committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**
3. **The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;**

AND

4. **The defendant's grossly negligent conduct caused the death of another person.**

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ *<insert misdemeanor[s] /infraction[s]>***.**

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Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s]*>.]

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ <*insert act[s] alleged*>.]

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/operated a vessel under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/ operated a vessel while having a blood alcohol level of 0.08 or higher).

***Gross negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:**

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

The combination of (driving a vehicle/operating a vessel) while under the influence of (an alcoholic beverage/ [and/or] a drug) and violating a (traffic/navigation) law is not enough by itself to establish gross negligence. In evaluating whether the defendant

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acted with gross negligence, consider the level of the defendant's intoxication, if any; the way the defendant (drove/operated the vessel); and any other relevant aspects of the defendant's conduct.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] otherwise lawful act[s] that might cause death): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

[The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter while intoxicated. If the People have not met this burden, you

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must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ <*insert lesser offense[s]*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 1, instruct on the particular "under the influence" offense charged. In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the driving under the influence offense and the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was

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required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

If the defendant is charged with one or more prior conviction (see Pen. Code, § 191.5(d)), the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial. (See Bench Notes to CALCRIM No. 3100.)

AUTHORITY

- Gross Vehicular Manslaughter While Intoxicated. Pen. Code, § 191.5.
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of the Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Gross Negligence. *People v. Penny*, (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Gross Negligence—Overall Circumstances. *People v. Bennett* (1992) 54 Cal.3d 1032, 1039 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].

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- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[2][c], [4], Ch. 145, *Narcotics and Alcohol Offenses,* §§ 145.02[4][c], 145.03[1][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Gross Negligence Without Intoxication. Pen. Code, § 192(c)(1); *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].
- Vehicular Manslaughter With Ordinary Negligence While Intoxicated. Pen. Code, § 192(c)(3); *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Vehicular Manslaughter With Ordinary Negligence Without Intoxication. Pen. Code, § 192(c)(2); *People v. Rodgers* (1949) 94 Cal.App.2d 166, 166 [210 P.2d 71].
- Injury to Someone While Driving Under the Influence of Alcohol or Drugs. Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

Gross vehicular manslaughter while intoxicated is *not* a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 992 [103 Cal.Rptr.2d 698, 16 P.3d 118].)

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

The Vehicle Code driving-under-the-influence offense of the first element cannot do double duty as the predicate unlawful act for the second element. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 81 [235 Cal.Rptr. 208].) "[T]he trial court erroneously omitted the 'unlawful act' element of

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vehicular manslaughter when instructing in . . . [the elements] by referring to Vehicle Code section 23152 rather than another 'unlawful act' as required by the statute." (*Id.* at p. 82.)

Predicate Act Need Not Be Inherently Dangerous

"[T]he offense which constitutes the 'unlawful act' need not be an inherently dangerous misdemeanor or infraction. Rather, to be an 'unlawful act' within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so." (*People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase "lawful act which might produce death, in an unlawful manner." (Pen. Code, § 191.5.) "[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care." (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase "in an unlawful manner" is omitted from element 2 as repetitive.

(New January 2006)

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591. Vehicular Manslaughter While Intoxicated—Ordinary Negligence

<If vehicular manslaughter while intoxicated—ordinary negligence is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>

[The defendant is charged [in Count ____] with vehicular manslaughter with ordinary negligence while intoxicated.]

<Introductory Sentence: Alternative B—Lesser Included Offense>

[Vehicular manslaughter with ordinary negligence while intoxicated is a lesser crime than the charged crime of gross vehicular manslaughter while intoxicated.]

To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence while intoxicated, the People must prove that:

1. **The defendant (drove under the influence of (an alcoholic beverage/[or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/ drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/operated a vessel under the influence of (an alcoholic beverage/ [or] a drug) [or a combined influence of an alcoholic beverage and a drug]/operated a vessel while having a blood alcohol level of 0.08 or higher);**
2. **While (driving that vehicle/operating that vessel) under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug], the defendant also committed (a/an) (misdemeanor[,]/ [or] infraction[,]] /[or] otherwise lawful act that might cause death);**
3. **The defendant committed the (misdemeanor[,]/ [or] infraction[,]] /[or] otherwise lawful act that might cause death) with ordinary negligence;**

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AND

4. The defendant's negligent conduct caused the death of another person.

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ <*insert misdemeanor[s]/ infraction[s]*>.

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s]*>.]

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ <*insert act[s] alleged*>.]

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or a combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/ drove under the influence of (an alcoholic beverage/ [or] a drug) [or a combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/operated a vessel under the influence of (an alcoholic beverage/ [or] a drug [or a combined influence of an alcoholic beverage and a drug])/operated a vessel while having a blood alcohol level of 0.08 or higher).

[The difference between this offense and the charged offense of gross vehicular manslaughter while intoxicated is the degree of negligence required. I have already defined *gross negligence* for you.]

***Ordinary negligence*[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).**

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to

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use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] otherwise lawful act[s] that might cause death): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

[The People have the burden of proving beyond a reasonable doubt that the defendant committed vehicular manslaughter with ordinary negligence while intoxicated. If the People have not met this burden, you must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ <*insert lesser offense[s]*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 1, instruct on the particular "under the influence" offense charged. In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the driving under the influence offense and the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

AUTHORITY

- Vehicular Manslaughter While Intoxicated. Pen. Code, § 192(c)(3).

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- Vehicular Manslaughter During Operation of a Vessel While Intoxicated. Pen. Code, § 192.5(c).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [82 Cal.Rptr. 688].
- Elements of the Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 735], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 30]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence. Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal. Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [2][c], [4], Ch. 145, *Narcotics and Alcohol Offenses,* § 145.02[4][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Ordinary Negligence Without Intoxication. Pen. Code, § 192(c)(2); see *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

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- Injury to Someone While Driving Under the Influence of Alcohol or Drugs. Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

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592. Gross Vehicular Manslaughter

<If gross vehicular manslaughter is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>

[The defendant is charged [in Count ____] with gross vehicular manslaughter.]

<Introductory Sentence: Alternative B—Lesser Included Offense>

[Gross vehicular manslaughter is a lesser crime than gross vehicular manslaughter while intoxicated.]

To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that:

1. **The defendant (drove a vehicle/operated a vessel);**
2. **While (driving that vehicle/operating that vessel), the defendant committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**
3. **The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;**

AND

4. **The defendant's grossly negligent conduct caused the death of another person.**

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ <*insert misdemeanor[s]/ infraction[s]*>.

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s]*>.]

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ <*insert act[s] alleged*>.]

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Gross negligence **involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:**

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with gross negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

**[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] otherwise lawful act[s] that might cause death): _____ <*insert alleged predicate*

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acts when multiple acts alleged>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]**

[The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter. If the People have not met this burden, you must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ <*insert lesser offense[s]*>**.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged.

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(*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

AUTHORITY

- Gross Vehicular Manslaughter. Pen. Code, § 192(c)(1).
- Gross Vehicular Manslaughter During Operation of a Vessel. Pen. Code, § 192.5(a).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 735], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Gross Negligence. *People v. Bennett* (1992) 54 Cal.3d 1032, 1036 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr.2d 849].

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- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [2][c], [4] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Ordinary Negligence. Pen. Code, § 192(c)(2); see *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Manslaughter During Operation of a Vessel Without Gross Negligence. Pen. Code, § 192.5(b).

RELATED ISSUES

Predicate Act Need Not Be Inherently Dangerous

"[T]he offense which constitutes the 'unlawful act' need not be an inherently dangerous misdemeanor or infraction. Rather, to be an 'unlawful act' within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so." (*People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rtpr.2d 699, 911 P.2d 1374].)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase "lawful act which might produce death, in an unlawful manner." (Pen. Code, § 192(c)(1).) "[C]omitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care." (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase "in an unlawful manner" is omitted from element 2 as repetitive.

(New January 2006)

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593. Misdemeanor Vehicular Manslaughter—Ordinary Negligence

<If misdemeanor vehicular manslaughter—ordinary negligence is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>

[The defendant is charged [in Count ____] with vehicular manslaughter.]

<Introductory Sentence: Alternative B—Lesser Included Offense>

[Vehicular manslaughter with ordinary negligence is a lesser crime than (gross vehicular manslaughter while intoxicated/ [and] gross vehicular manslaughter/ [and] vehicular manslaughter with ordinary negligence while intoxicated.)]

To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that:

1. **The defendant (drove a vehicle/operated a vessel);**
2. **While (driving that vehicle/operating that vessel), the defendant committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**
3. **The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with ordinary negligence;**

AND

4. **The defendant's negligent conduct caused the death of another person.**

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ <*insert misdemeanor[s]/ infraction[s]*>.

Instruction[s] ____ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s]*>.]

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[The People [also] allege that the defendant committed the following otherwise lawful act[s] that might cause death: _____ <*insert act[s] alleged*>.]

[The difference between this offense and the charged offense of gross vehicular manslaughter is the degree of negligence required. I have already defined gross negligence for you.]

***Ordinary negligence*[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).**

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] lawful act[s] that might cause death): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which

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(misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion. In the definition of ordinary negligence, the court should use the entire phrase "harm to oneself or someone else" if

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the facts of the case show a failure by the defendant to prevent harm to him-or herself rather than solely harm to another.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

AUTHORITY

- Vehicular Manslaughter Without Gross Negligence. Pen. Code, § 192(c)(2).
- Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence. Pen. Code, § 192.5(b).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rtptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence. Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [2][c], [4] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 592, *Gross Vehicular Manslaughter*.

(New January 2006)

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594. Vehicular Manslaughter: Collision for Financial Gain

The defendant is charged [in Count ____] with vehicular manslaughter by causing a collision for financial gain.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **While driving a vehicle, the defendant knowingly caused or participated in a vehicular collision;**
2. **When the defendant acted, (he/she) knew that the purpose of the vehicular collision was to make a false or fraudulent insurance claim for financial gain;**
3. **When the defendant acted, (he/she) did so with intent to defraud;**

AND

4. **The collision caused the death of another person.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Related Instructions

CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

AUTHORITY

- Elements. Pen. Code, § 192(c)(4).
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Intent to Defraud—Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 236.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[2][c], [4] (Matthew Bender).

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RELATED ISSUES

Does Not Preclude Murder Charge

Section 192(c)(4) of the Penal Code states that: "This provision shall not be construed to prevent prosecution of a defendant for the crime of murder."

Probable and Natural Consequences of a Conspiracy

A nondriver coconspirator may be liable for a death that results from a conspiracy to commit a vehicular collision for insurance fraud under the natural and probable consequences doctrine. (*People v. Superior Court (Shamis)* (1998) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].)

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595. Vehicular Manslaughter: Speeding Laws Defined

<A. Violation of Maximum Speed Law, Veh. Code, § 22349>

[To prove that the defendant committed a violation of the maximum speed law, the People must prove that:

1. The defendant drove a vehicle on a highway;

AND

2. The defendant drove faster than (65/55/_____ <*insert other posted speed limit*>) mph.

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel and includes a street.]]

<B. Violation of Basic Speed Law, Veh. Code, § 22350>

[To prove that the defendant committed a violation of the basic speed law, the People must prove that:

1. The defendant drove a vehicle on a highway;

AND

2. The defendant drove (faster than a reasonable person would have driven considering the weather, visibility, traffic, and conditions of the highway/ [or] at a speed that endangered the safety of other people or property).

The speed of travel, alone, does not establish whether a person did or did not violate the basic speed law. When determining whether the defendant violated the basic speed law, consider not only the speed, but also all the surrounding conditions known by the defendant and also what a reasonable person would have considered a safe rate of travel given those conditions.

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel and includes a street.]]

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<C. Violation of Prima Facie Speed Law, Veh. Code, §§ 22351, 22352>

[To prove that the defendant committed a violation of the prima facie speed law, the People must prove that:

1. **The defendant drove a vehicle on a highway;**
2. **The defendant drove faster than (15/25) mph;**

[AND]

3. **The defendant drove** _____ *<insert appropriate description from Veh. Code, § 22352 of area where alleged violation occurred>***(;/.)**

[AND

4. **The defendant's rate of speed was faster than a reasonable person would have driven considering the weather, visibility, traffic, and conditions of the highway.]**

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel and includes a street.]

[When determining whether the defendant drove faster than a reasonable person would have driven, consider not only the speed, but also all the surrounding conditions known by the defendant and also what a reasonable person would have considered a safe rate of travel given those conditions.

The People have the burden of proving beyond a reasonable doubt that the defendant's rate of travel was not reasonable given the overall conditions, even if the rate of travel was faster than the prima facie speed law. If the People have not met this burden, you must find the defendant did not violate the prima facie speed law.]]

BENCH NOTES

Instructional Duty

In a vehicular manslaughter case, the court has a **sua sponte** duty instruct on the elements of the predicate misdemeanors or infractions alleged.

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(*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) This instruction covers some of the more common infractions alleged. The court **must** give all appropriate instructions defining the element of vehicular manslaughter with this instruction.

When instructing on the prima facie speed law, insert the appropriate description of where the defendant was driving when the alleged violation occurred. If the defendant presents evidence that the rate of travel was not in violation of the basic speed law even though in violation of the prima facie speed law, give bracketed element 4 and the two bracketed paragraphs that begin, "When determining whether the defendant drove faster than a reasonable person". (Veh. Code, §§ 22351, 22352.)

The court should define the term highway; however, it need only be defined once. If the court instructs on multiple Vehicle Code sections, give the bracketed definition of highway at the end of the last Vehicle Code section instructed on.

AUTHORITY

- Maximum Speed Law. Veh. Code, § 22349.
- Basic Speed Law. Veh. Code, § 22350.
- Prima Facie Speed Law. Veh. Code, §§ 22351, 22352.
- Highway Defined. Veh. Code, § 360.
- Duty to Instruct on Elements of Predicate Offense. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Public Peace and Welfare, § 253.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.02[2][c], [3][b], Ch. 145, *Narcotics and Alcohol Offenses,* § 145.02[1][d] (Matthew Bender).

(New January 2006)

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G. ATTEMPT

600. Attempted Murder

The defendant is charged [in Count ____] with attempted murder.

To prove that the defendant is guilty of attempted murder, the People must prove that:

1. **The defendant took at least one direct but ineffective step toward killing (another person/ [or] a fetus);**

AND

2. **The defendant intended to kill that (person/ [or] fetus).**

A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.]

[A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, the People must

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prove that the defendant not only intended to kill _____ <*insert name of primary target alleged*> but also either intended to kill _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*> or intended to kill _____ <*insert name of primary target alleged*> by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>.]

[The defendant may be guilty of attempted murder even if you conclude that murder was actually completed.]

[A *fetus* is an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which occurs at seven to eight weeks of development.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the crime of attempted murder when charged, or if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on lesser included offenses in homicide generally].)

The penultimate bracketed paragraph is provided for cases in which the prosecution theory is that the defendant created a "kill zone," harboring the specific and concurrent intent to kill anyone in the zone. (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107].) "[T]he defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred, intent theory." (*Id.* at p. 331.) In such cases,

> [t]he defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may

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reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.

(*Id.* at p. 330, quoting *Ford v. State* (1993) 330 Md. 682, 717 [625 A.2d 984].) The *Bland* court stated that a special instruction on this issue was not required. (*Id*. at p. 331, fn. 6.) The bracketed language is provided for the court to use at its discretion.

Give the next-to-last bracketed paragraph when the defendant has been charged only with attempt to commit murder, but the evidence at trial reveals that the murder was actually completed. (See Pen. Code, § 663.)

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

CALCRIM No. 601, *Attempted Murder: Deliberation and Premeditation*.

CALCRIM No. 602, *Attempted Murder: Peace Officer, Firefighter, or Custodial Officer*.

CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

CALCRIM No. 604, *Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 663, 664.
- Murder Defined. Pen. Code, § 187.
- Specific Intent to Kill Required. *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 53–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02[3]; Ch. 141, *Conspiracy, Solicitation,*

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and Attempt, § 141.20; Ch. 142, *Crimes Against the Person,* § 142.01[3][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

Attempted voluntary manslaughter is a lesser included offense. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].)

RELATED ISSUES

Specific Intent Required

"[T]he crime of attempted murder requires a specific intent to kill . . . ." (*People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].)

> In instructing upon the crime of attempt to commit murder, there should never be any reference whatsoever to implied malice. Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do.

(*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709].)

Solicitation

Attempted solicitation of murder is a crime. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 460 [94 Cal.Rptr.2d 910].)

No Attempted Involuntary Manslaughter

"[T]here is no such crime as attempted involuntary manslaughter." (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

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Transferred and Concurrent Intent

"[T]he doctrine of transferred intent does not apply to attempted murder." (*People v. Bland* (2002) 28 Cal.4th 313, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107].) "[T]he defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred, intent theory." (*Id.*)

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601. Attempted Murder: Deliberation and Premeditation

If you find the defendant guilty of attempted murder [under Count ____], you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation.

(The defendant/_____ <*insert name or description of principal if not defendant*>**) acted *willfully* if (he/she) intended to kill when (he/she) acted. (The defendant/**_____ <*insert name or description of principal if not defendant*>**) *deliberated* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. (The defendant/**_____ <*insert name or description of principal if not defendant*>**) *premeditated* if (he/she) decided to kill before acting.**

[The attempted murder was done willfully and with deliberation and premeditation if either the defendant or _____ <*insert name or description of principal*> **or both of them acted with that state of mind.]**

The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000)

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530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; Pen. Code, § 664(a).) Give this instruction when an enhancement for deliberation and premeditation is charged.

This instruction **must** be given with CALCRIM No. 600, *Attempted Murder*.

AUTHORITY

- Willful, Deliberate, and Premeditated Murder. Pen. Code, § 189.
- Willful, Deliberate, and Premeditated Attempted Murder. Pen. Code, § 664(a).
- Premeditation and Deliberation Defined. *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 53–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02[3]; Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [g], [3][e] (Matthew Bender).

RELATED ISSUES

Accomplice Liability

An aider and abettor is subject to this penalty provision where the principal attempted a willful, deliberate, and premeditated murder even though the accomplice did not personally deliberate or premeditate. (*People v. Lee* (2003) 31 Cal.4th 613, 622–623 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1473 [61 Cal.Rptr.2d 680].) The accomplice must still share the intent to kill. (*People v. Lee, supra,* 31 Cal.4th at pp. 623–624.)

Sentencing Enhancement

Penal Code section 664(a) is a sentencing enhancement, and does not create a greater degree of attempted murder. (*People v. Bright* (1996) 12 Cal.4th 652, 656–657 [49 Cal.Rptr.2d 732, 909 P.2d 1354]; but see *Jones*

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v. Smith (9th Cir. 2001) 231 F.3d 1227, 1236 [questioning the continuing validity of *Bright* in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]].)

See also the Related Issues Section to CALCRIM No. 521, *Murder: Degrees* for discussion of "deliberate and premeditated."

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602. Attempted Murder: Peace Officer, Firefighter, or Custodial Officer

If you find the defendant guilty of attempted murder [under Count ____], you must then decide whether the People have proved the additional allegation that (he/she) attempted to murder a (peace officer/firefighter/custodial officer).

To prove this allegation, the People must prove that:

1. _____ <*insert officer's name, excluding title*> **was a (peace officer/firefighter/custodial officer) lawfully performing (his/her) duties as a (peace officer/firefighter/custodial officer);**

AND

2. **When the defendant attempted the murder, the defendant knew, or reasonably should have known, that** _____ <*insert officer's name, excluding title*> **was a (peace officer/firefighter/custodial officer) who was performing (his/her) duties.**

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer"*>**.]**

[The duties of (a/an) _____ <*insert title of peace officer, firefighter, or custodial officer*> **include** _____ <*insert job duties*>**.]**

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

[A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody

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of prisoners, and helps operate a local detention facility. [[A/An] (county jail/city jail/_____ <*insert other detention facility*>) is a local detention facility.] [A custodial officer is not a peace officer.]]

<If the custodial officer is employed by a law enforcement agency of San Diego County, Fresno County, Kern County, Stanislaus County, Riverside County, Santa Clara County, or a county having a population of 425,000 or less, give the following sentence in place of the definition above.>

[A person designated as (a/an) (correctional officer/jailer/_____ <*insert similar title*>) employed by the county of _____ <*insert name of county designated by Penal Code section 831.5(a)*> is a custodial officer.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In order to be "engaged in the performance of his or her duties," a peace officer or custodial officer must be acting lawfully. (*People v. Gonzalez*

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(1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance of a peace officer and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance of a custodial officer is an issue, give the bracketed paragraph on lawful performance of a custodial officer and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer.*

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

Penal Code section 664(e) refers to the definition of peace officer used in Penal Code section 190.2(a)(7), which defines "peace officer" as "defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12."

Penal Code section 664(e) refers to the definition of firefighter used in Penal Code section 190.2(a)(9), which defines "firefighter" "as defined in Section 245.1."

The court may give the bracketed sentence that begins, "The duties of (a/an) _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a

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facially valid search . . . warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

In the bracketed definition of "local detention facility," do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

AUTHORITY

- Attempted Murder on a Peace Officer or Firefighter. Pen. Code, § 664(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Firefighter Defined. Pen. Code, § 245.1.
- Custodial Officer as Referenced in Pen. Code, § 664, Defined. Pen. Code, §§ 831(a) and 831.5(a).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 241.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person,* § 142.01[3][e] (Matthew Bender).

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603. Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense

An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion.

The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if:

1. **The defendant took at least one direct but ineffective step toward killing a person;**
2. **The defendant intended to kill that person;**
3. **The defendant attempted the killing because (he/she) was provoked;**
4. **The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment;**

AND

5. **The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment.**

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of

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average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.

[If enough time passed between the provocation and the attempted killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not attempt to kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on attempted voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing charge of completed murder]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531] [same].)

Related Instructions

CALCRIM No. 511, *Excusable Homicide: Accident in the Heat of Passion*.

CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

CALCRIM No. 604, *Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 664.
- Manslaughter Defined. Pen. Code, § 192.
- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[2][a] (Matthew Bender).

RELATED ISSUES

Specific Intent to Kill Required

> An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824 [217 Cal.Rptr. 581] [citation omitted].)

No Attempted Involuntary Manslaughter

There is no crime of attempted *involuntary* manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

See the Related Issues section to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

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604. Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense

An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because (he/she) acted in imperfect (self-defense/ [or] defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and imperfect (self-defense/ [or] defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in imperfect (self-defense/ [or] defense of another) if:

1. **The defendant took at least one direct but ineffective step toward killing a person.**
2. **The defendant intended to kill when (he/she) acted.**
3. **The defendant believed that (he/she/ [or] someone else/_____ <*insert name of third party*>) was in imminent danger of being killed or suffering great bodily injury.**

AND

4. **The defendant believed that the immediate use of deadly force was necessary to defend against the danger.**

BUT

5. **The defendant's beliefs were unreasonable.**

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of violence to (himself/herself/ [or] someone else).

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In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

[If you find that _____ <*insert name of alleged victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant knew that _____ <*insert name of alleged victim*> had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of alleged victim*>, you may consider that threat in evaluating the defendant's beliefs.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on attempted voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing charge of completed murder]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531] [same].)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be

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at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

In evaluating whether the defendant actually believed in the need for self-defense, the jury may consider the effect of antecedent threats and assaults against the defendant, including threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337].) If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults on request.

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 664.
- Manslaughter Defined. Pen. Code, § 192.
- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].
- Imperfect Self-Defense Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995)

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12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[2][a] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense* and CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

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H. CAUSATION: SPECIAL ISSUES

620. Causation: Special Issues

There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

<A. Negligence of Decedent or Third Party, Not Medical Personnel>

[The failure of _____ <insert name of decedent> **or another person to use reasonable care may have contributed to the death. But if the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death even though _____** *<insert name of decedent>* **or another person may have failed to use reasonable care.]**

<B. Negligence of Medical Personnel>

[The failure of the (doctor(s)/ [or] medical staff) to use reasonable care in treating _____ *<insert name of decedent>* **may have contributed to the death. But if the injury inflicted by the defendant was a substantial factor causing the death, then the defendant is legally responsible for the death even though the (doctor[s]/ [or] medical staff) may have failed to use reasonable care. On the other hand, if the injury inflicted by the defendant was not a substantial factor causing the death, but the death was caused by grossly improper treatment by the (doctor[s]/[or] medical staff), then the defendant is not legally responsible for the death.]**

<C. Vulnerable Victim—Injury Accelerating Death>

[_____ *<insert name of decedent>* **may have suffered from an illness or physical condition that made (him/her) more likely to die from the injury than the average person. The fact that _____** *<insert name of decedent>* **may have been more physically vulnerable is not a defense to (murder/ [or]**

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manslaughter). If the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death. This is true even if _____ <*insert name of decedent*> would have died in a short time as a result of other causes or if another person of average health would not have died as a result of the defendant's actions.]

If you have a reasonable doubt whether the defendant's act caused the death, you must find (him/her) not guilty.

BENCH NOTES

Instructional Duty

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].)

AUTHORITY

- Negligence of Third Party. *People v. Clark* (1951) 106 Cal.App.2d 271, 277–278 [235 P.2d 56]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].
- Negligence of Medical Staff. *People v. McGee* (1947) 31 Cal.2d 229, 240–241 [187 P.2d 706]; *People v. Roberts* (1992) 2 Cal.4th 271, 312 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Vulnerable Victim. *People v. Catlin* (2001) 26 Cal.4th 81, 155–157 [109 Cal.Rptr.2d 31, 26 P.3d 357]; *People v. Phillips* (1966) 64 Cal.2d 574, 579 [51 Cal.Rptr. 225, 414 P.2d 353], disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209 [82 Cal.Rptr. 598].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 37, 38, 43.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04; Ch. 142, *Crimes Against the Person,* §§ 142.01[1][c], 142.02[1][c] (Matthew Bender).

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I. IMPAIRMENT DEFENSE

625. Voluntary Intoxication: Effects on Homicide Crimes

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ <*insert other specific intent required in a homicide charge or other charged offense*>.]

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

You may not consider evidence of voluntary intoxication for any other purpose.

BENCH NOTES

Instructional Duty

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a "pinpoint" instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra,* 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

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If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include "whether the defendant intended to inflict extreme and prolonged pain." Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include "whether the defendant intended to take property by force or fear."

AUTHORITY

- Voluntary Intoxication Defined. Pen. Code, § 22(c).
- Unconsciousness Not Required. *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- No Sua Sponte Duty to Instruct. *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Evidence of Intoxication Inapplicable to Implied Malice. Pen. Code, § 22(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
- Applies to Attempted Murder. *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
- Voluntary Intoxication Relevant to Knowledge. *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 26–30.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][e], [f], [2][b], [3][c] (Matthew Bender).

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RELATED ISSUES

General Instruction on Voluntary Intoxication

This instruction is a specific application of CALCRIM No. 3426, *Voluntary Intoxication*, to homicide.

Unconsciousness

Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

Not Applicable in Murder Cases Based Exclusively on Implied Malice

This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice, because voluntary intoxication can only negate *express* malice. (Pen. Code, § 22(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

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626. Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes

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Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions.

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter.

Involuntary manslaughter has been proved if you find beyond a reasonable doubt that:

1. **The defendant killed without legal justification or excuse;**
2. **The defendant did not act with the intent to kill;**
3. **The defendant did not act with a conscious disregard for human life;**

AND

4. **As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions.**

The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter).

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary intoxication causing unconsciousness if there is evidence to support this finding. (*People v. Graham* (1969) 71 Cal.2d 303, 316 [78 Cal.Rptr. 217, 455 P.2d 153] [partially abrogated by Pen. Code, § 22(c)]; *People v. Ochoa* (1998) 19 Cal.4th 353, 423–424 [79 Cal.Rptr.2d 408, 966 P.2d 442].) However, the court may properly refuse to give this instruction when the evidence shows that the defendant acted with malice before becoming intoxicated. (*People v. Whitfield* (1994) 7 Cal.4th 437, 455 [27 Cal.Rptr.2d 858, 868 P.2d 272] [partially abrogated by amendments to Pen. Code, § 22(a)].)

In *People v. Ochoa* (1998) 19 Cal.4th 353, 423–424 [79 Cal.Rptr.2d 408, 966 P.2d 442] [quoting *People v. Graham* (1969) 71 Cal.2d 303, 316 [78 Cal.Rptr. 217, 455 P.2d 153]], the court stated,

> [I]f the state of unconsciousness results from intoxication voluntarily induced . . . it is not a complete defense. If the intoxication is voluntarily induced, it can never excuse homicide. . . . [The] requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication.

The committee has chosen not to include the phrase "criminal negligence is deemed to exist" because the committee concluded that this unnecessarily complicates the issue for the jury.

AUTHORITY

- Definition of Voluntary Intoxication. Pen. Code, § 22(c).
- Presumption of Criminal Negligence. *People v. Graham* (1969) 71 Cal.2d 303, 317, fn. 4 [78 Cal.Rptr. 217, 455 P.2d 153] [partially abrogated by Pen. Code, § 22(c)].
- Malice Preceded Intoxication. *People v. Whitfield* (1994) 7 Cal.4th 437, 455 [27 Cal.Rptr.2d 858, 868 P.2d 272] [partially abrogated by amendments to Pen. Code, § 22(a)].
- Criminal Negligence. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 226.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][e], [f], [2][b], [3][c] (Matthew Bender).

RELATED ISSUES

Unconsciousness Does Not Require Inability to Move

"[U]nconsciousness can exist. . . where the subject physically acts in fact but is not, at the time, conscious of acting." (*People v. Ochoa* (1998) 19 Cal.4th 353, 424 [79 Cal.Rptr.2d 408, 966 P.2d 442] [citations and internal quotation marks omitted]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 343–344 [116 Cal.Rptr.2d 401, 39 P.3d 432].)

Malice Preceded Intoxication: Drunk Driving

In a case in which the defendant was convicted of second degree murder following a fatal drunk driving accident, the trial court properly refused to give an unconsciousness instruction where the defendant's long history of drinking and driving established that he acted with malice prior to becoming intoxicated. (*People v. Whitfield* (1994) 7 Cal.4th 437, 455 [27 Cal.Rptr.2d 858, 868 P.2d 272] [partially abrogated by amendments to Pen. Code, § 22(a)].)

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627. Hallucination: Effect on Premeditation

A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening.

You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation.

The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give defense instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

"[E]vidence of a hallucination—a perception with no objective reality—is inadmissible to negate malice so as to mitigate murder to voluntary manslaughter but is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder." (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677 [126 Cal.Rptr.2d 889].)

AUTHORITY

- Hallucination Evidence. *People v. Padilla* (2002) 103 Cal.App.4th 675, 677 [126 Cal.Rptr.2d 889].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.03 (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][g] (Matthew Bender).

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J. CHARGE TO JURY

640. Procedure for Completion of Verdict Forms: With *Stone* Instruction

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You have been given several verdict forms for (the/each) count of murder [and manslaughter]. [These instructions apply to each count separately.]

In connection with Count[s] ____, I have given you ____ <*insert number of verdict forms*> separate verdict forms. These are: Guilty/Not Guilty of first degree murder and second degree murder [and (voluntary manslaughter[,]/ [and] involuntary manslaughter)].

You may consider these different kinds of homicide in whatever order you wish. I am going to explain how to complete the verdict forms using one order, but you may choose the order to use. As with all the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision.

If you all agree the People have not proved the defendant committed an unlawful killing, then you must complete each verdict form stating that (he/she) is not guilty.

If you all agree the People have proved the defendant killed unlawfully, you must decide what kind or degree of unlawful killing the People have proved.

If you all agree that the People have proved that the unlawful killing was first degree murder, complete the verdict form stating that the defendant is guilty of first degree murder. Do not complete the other verdict forms for this count.

If you all agree that the defendant is not guilty of first degree murder, but you agree the People have proved the killing was second degree murder, you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Then, complete the verdict form stating that the

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defendant is guilty of second degree murder. Do not complete the verdict form stating that the defendant is guilty of second degree murder unless you all agree that the defendant is not guilty of first degree murder. Do not complete the other verdict forms for this count.

If you all agree the People have proved the defendant committed murder, but you cannot all agree on which degree they have proved, do not complete any verdict forms. Instead, the foreperson should send a note reporting that you cannot all agree on the degree of murder that has been proved.

If you all agree that the defendant is not guilty of first degree murder, but you cannot all agree on whether or not the People have proved the defendant committed second degree murder, then you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Second, the foreperson should send a note reporting that you cannot all agree that second degree murder has been proved. Do not complete any other verdict forms for this count.

The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

<A. Voluntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved that (he/she) is guilty of voluntary manslaughter, then you must do two things. First, complete the verdict forms stating that (he/she) is not guilty of first and second degree murder. Second, complete the verdict form stating that (he/she) is guilty of voluntary manslaughter. Do not complete the verdict form stating that the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder. Do not complete any other verdict forms for this count.

If you all agree that the defendant is not guilty of first or second degree murder, but you cannot all agree on whether or not the People have proved the defendant committed voluntary manslaughter, then you must do two things. First, complete both

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verdict forms stating that the defendant is not guilty of first and second degree murder. Second, the foreperson should send a note reporting that you cannot all agree that voluntary manslaughter has been proved.

The People have the burden of proving that the defendant committed murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder.]

<B. Involuntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of murder or voluntary manslaughter, but you all agree the People have proved that (he/she) is guilty involuntary manslaughter, then you must do two things. First, complete the verdict forms stating that (he/she) is not guilty of first degree murder, second degree murder, and voluntary manslaughter. Second, complete the verdict form stating that (he/she) is guilty of involuntary manslaughter. Do not complete the verdict form stating that the defendant is guilty of involuntary manslaughter unless you all agree that the defendant is not guilty of murder or voluntary manslaughter.

If you all agree that the defendant is not guilty of murder or voluntary manslaughter, but you cannot all agree whether or not the People have proved the defendant committed involuntary manslaughter, then you must do two things. First, complete all three verdict forms stating that the defendant is not guilty of first degree murder, second degree murder, and voluntary manslaughter. Second, the foreperson should send a note reporting that you cannot all agree that involuntary manslaughter has been proved.

The People have the burden of proving that the defendant committed murder or voluntary manslaughter rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.]

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BENCH NOTES

Instructional Duty

In all homicide cases where one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*, in place of this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must give this instruction, providing the jury an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

The court should not accept a guilty verdict on a lesser offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, retrial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If,

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despite the court's instructions, the jury has returned a guilty verdict on the lesser offense without explicitly acquitting on the greater offense, the court must again instruct the jury that in may not convict of the lesser offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 310.) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 330–331.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909 [98 Cal.Rptr.2d 431, 4 P.3d 265].)

This instruction should be modified if the highest charge is second degree murder or voluntary manslaughter. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 700 [97 Cal.Rptr. 251] [error to instruct jury that it must agree on degree of murder where case submitted to jury on second degree murder only], disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 513 [119 Cal.Rptr. 225, 531 P.2d 793].)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Degree to Be Set by Jury. Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752].

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- Reasonable Doubt as to Degree. Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Re-trial on Greater. Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Trial, § 631.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[3][c] (Matthew Bender).

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641. Procedure for Completion of Verdict Forms: Without *Stone* Instruction

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You have been given [one] verdict form[s] for (the/each) count of murder [and manslaughter]. [These instructions apply to each count separately.]

You may consider these different kinds of homicide in whatever order you wish. I am going to explain how to complete the verdict form[s] using one order, but you may choose the order to use.

As with all the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision.

If you all agree the People have not proved the defendant committed an unlawful killing, then you must state on the verdict form that (he/she) is not guilty.

If you all agree the People have proved the defendant committed murder, you must also decide what degree of murder the People have proved. You must all agree on the degree of murder (he/she) committed. If you all agree that the defendant is guilty of murder and on the degree of murder, then complete the form stating that the defendant is guilty of murder and the degree. Do not return a verdict form stating that the defendant is guilty of second degree murder unless you all agree that the defendant is not guilty of first degree murder.

The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

<A. Voluntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved (he/she) is guilty of voluntary manslaughter, then complete the verdict form stating that (he/she) is guilty of voluntary manslaughter. Do not complete a verdict form stating the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder.

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The People have the burden of proving that the defendant committed murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder.]

<B. Involuntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of murder and not guilty of voluntary manslaughter, but you all agree the People have proved that the defendant is guilty of involuntary manslaughter, then complete the verdict form stating that (he/she) is guilty of involuntary manslaughter. Do not complete a verdict form stating that the defendant is guilty of involuntary manslaughter unless you all agree that the defendant is not guilty of murder and not guilty of voluntary manslaughter.

The People have the burden of proving that the defendant committed murder or voluntary manslaughter rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.]

BENCH NOTES

Instructional Duty

In all homicide cases where one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With* Stone *Instruction*. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]

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[duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must provided the jury an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.) In such cases, the court must give CALCRIM No. 640 and must provide the jury with verdict forms of guilty/not guilty for each offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

The court should not accept a guilty verdict on a lesser offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, re-trial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court's instructions, the jury has returned a guilty verdict on the lesser offense without explicitly acquitting on the greater offense, the court must again instruct the jury that in may not convict of the lesser offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 310.) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to re-try the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than re-try the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

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The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 322, 330.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909 [98 Cal.Rptr.2d 431, 4 P.3d 265].)

This instruction should be modified if the highest charge is second degree murder or voluntary manslaughter. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 700 [97 Cal.Rptr. 251] [error to instruct jury that it must agree on degree of murder where case submitted to jury on second degree murder only], disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 513 [119 Cal.Rptr. 225, 531 P.2d 793].)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Degree to Be Set by Jury. Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752].
- Reasonable Doubt as to Degree. Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Re-trial on Greater. Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Trial, § 631.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[3][c] (Matthew Bender).

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K. SPECIAL CIRCUMSTANCES

(i) General Instructions

700. Special Circumstances: Introduction

If you find (the/a) defendant guilty of first degree murder, you must also decide whether the People have proved that [one or more of] the special circumstance[s] is true.

The People have the burden of proving (the/each) special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved. [You must return a verdict form stating true or not true for each special circumstance on which you all agree.]

In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree.

[You must (consider each special circumstance separately/ [and you must] consider each special circumstance separately for each defendant).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the special circumstances and to instruct that, in the case of a reasonable doubt, the jury must find the special circumstance not true. (Pen. Code, § 190.4; see *People v. Frierson* (1979) 25 Cal.3d 142, 180 [158 Cal.Rptr. 281, 599 P.2d 587]; *People v. Ochoa* (1998) 19 Cal.4th 353, 420 [79 Cal.Rptr.2d 408, 966 P.2d 442].)

The court has a **sua sponte** duty to instruct the jury to consider each special circumstance separately. (See *People v. Holt* (1997) 15 Cal.4th 619, 681 [63 Cal.Rptr.2d 872, 937 P.2d 213].) Give the bracketed paragraph if more than one special circumstance is charged or there are multiple defendants.

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Where multiple special circumstances are charged, the court may accept a partial verdict if the jury is unable to unanimously agree on all of the special circumstances. (Pen. Code, § 190.4.)

AUTHORITY

- Reasonable Doubt. Pen. Code, § 190.4; *People v. Frierson* (1979) 25 Cal.3d 142, 180 [158 Cal.Rptr. 281, 599 P.2d 587]; *People v. Ochoa* (1998) 19 Cal.4th 353, 420 [79 Cal.Rptr.2d 408, 966 P.2d 442].
- Partial Verdict. Pen. Code, § 190.4.
- Consider Each Special Circumstance Separately. *People v. Holt* (1997) 15 Cal.4th 619, 681 [63 Cal.Rptr.2d 872, 937 P.2d 213].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 461.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.02, 87.10–87.15, 87.24 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[4][a] (Matthew Bender).

RELATED ISSUES

Right to Jury Trial on Special Circumstances

Unless specifically waived, the defendant has a right to jury trial on the special circumstance allegations even if the defendant pleaded guilty to the underlying charges. (*People v. Granger* (1980) 105 Cal.App.3d 422, 428 [164 Cal.Rptr. 363].)

Prior Conviction for Murder Requires Bifurcated Trial

If the defendant is charged with the special circumstance of a prior conviction for murder, under Penal Code section 190.2(a)(2), the court must bifurcate the trial. (Pen. Code, § 190.1.) The jury should first determine whether the defendant is guilty of first degree murder and whether any other special circumstances charged are true. *(Ibid.)* The prior conviction special circumstance should then be submitted to the jury in a separate proceeding. *(Ibid.)*

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All Special Circumstances Constitutional Except Heinous or Atrocious Murder

The special circumstance for a heinous, atrocious, or cruel murder (Pen. Code, § 190.2(a)(14)) has been held to be unconstitutionally vague. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803 [183 Cal.Rptr. 800, 647 P.2d 76]; *People v. Sanders* (1990) 51 Cal.3d 471, 520 [273 Cal.Rptr. 537, 797 P.2d 561].) No other special circumstance has been found unconstitutional.

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701. Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990

If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] _____ <*insert special circumstance[s] without intent requirement for actual killer*>, you must also decide whether the defendant acted with the intent to kill.

In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove that the defendant acted with the intent to kill.

[The People do not have to prove that the actual killer acted with the intent to kill in order for (this/these) special circumstance[s] to be true. [If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find that the defendant acted with the intent to kill.]]

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with the intent to kill for the special circumstance[s] _____ <*insert special circumstance[s] without intent requirement for actual killer*> to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084,

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1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. *(Ibid.)*

For all murders committed prior to June 6, 1990, the People must prove that an aider and abettor or coconspirator acted with intent to kill for all special circumstances except Penal Code section 190.2(a)(2) (prior conviction for murder). (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306] [modifying *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862]]; see pre-June 6, 1990, Pen. Code, § 190.2(b).) Since the Supreme Court ruling in *People v. Anderson, supra,* the People do not have to show intent to kill on the part of the actual killer unless specified in the special circumstance. (*People v. Anderson, supra,* 43 Cal.3d at p. 1147.) However, if the killing occurred during the window of time between *Carlos* and *Anderson* (1983 to 1987), then the People must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931].)

Use this instruction for any case in which the jury could conclude that the defendant was an accomplice to a homicide that occurred prior to June 6, 1990, where any special circumstance is charged that does not require intent to kill on the part of the actual killer, other than Penal Code section 190.2(a)(2). For those special circumstances where intent to kill is required for both the actual killer and the accomplice, this instruction is not required. For those special circumstances, the instruction on the special circumstance states "the defendant intended to kill" as an element.

The court should carefully review the prior versions of Penal Code section 190.2 to determine if the special circumstance required intent to kill at the time of the killing because the special circumstances have been amended by referendum several times.

Give the bracketed paragraph stating that the People do not have to prove intent to kill on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

If the jury could convict the defendant either as a principal or as an accomplice, and the defendant is charged with a special circumstance that does not require intent to kill by the principal, then jury must find intent to kill if they cannot agree that the defendant was the actual killer. (*People v.*

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Jones (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) In such cases, the court should give both bracketed paragraphs.

If the homicide occurred between 1983 and 1987, do not give this instruction. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931].) For homicides during that period, the prosecution must prove intent to kill by the actual killer as well as the accomplice. The court should make sure that the instruction on the special circumstance states that the prosecution must prove that the defendant intended to kill.

Do not give this instruction if accomplice liability is not at issue in the case.

Related Instructions

CALCRIM No. 702, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder.*

CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).*

AUTHORITY

- Accomplice Intent Requirement. Pre-June 6, 1990, Pen. Code, § 190.2(b); *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.14 (Matthew Bender).

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702. Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder

If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] of _____ <*insert only special circumstance[s] under Pen. Code, §§ 190.2(a)(2), (3), (4), (5) or (6)*>, you must also decide whether the defendant acted with the intent to kill.

In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove that the defendant acted with the intent to kill.

[The People do not have to prove that the actual killer acted with the intent to kill in order for (this/these) special circumstance[s] to be true. [If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find that the defendant acted with the intent to kill.]]

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with the intent to kill for the special circumstance[s] _____ <*insert only special circumstance[s] under Pen. Code, §§ 190.2(a)(2), (3), (4), (5) or (6)*> to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant

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was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.2d 359].) If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. *(Ibid.)*

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127]. The current law provides that the actual killer does not have to act with intent to kill unless the special circumstance specifically requires intent. (Pen. Code, § 190.2(b).) A defendant who is not the actual killer must act with intent to kill unless the felony-murder special circumstance is charged. (Pen. Code, §§ 190.2(c), (d).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer either acted with intent to kill or was a major participant and acted with reckless indifference to human life. (Pen. Code, § 190.2(d); *People v. Estrada* (1995) 11 Cal.4th 568, 571 [46 Cal.Rptr.2d 586, 904 P.2d 1197].)

Use this instruction for any case in which the jury could conclude that the defendant was an accomplice to a homicide that occurred after June 5, 1990, and the defendant is charged with a special circumstance, other than felony murder, that does not require intent to kill by the actual killer. Currently, the only special circumstances, other than felony murder, that do not require intent to kill by the actual killer are: Prior conviction for murder (§ 190.2(a)(2)); Multiple offenses of murder (§ 190.2(a)(3)); Murder by hidden explosive (§ 190.2(a)(4)); Murder to avoid arrest (§ 190.2(a)(5)); and Murder by mail bomb (§ 190.2(a)(6)). However, the court should carefully review the prior versions of Penal Code section 190.2 to determine if the special circumstance required intent to kill at the time of the killing because the special circumstances have been amended by referendum several times.

For those special circumstances where intent to kill is required for both the actual killer and the accomplice, this instruction is not required. For those special circumstances, the instruction on the special circumstance states "the defendant intended to kill" as an element.

When the felony-murder special circumstance is charged, use CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).*

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Give the bracketed paragraph stating that the People do not have to prove intent to kill on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

If the jury could convict the defendant either as a principal or as an accomplice, and the defendant is charged with one of the special circumstances that does not require intent to kill by the principal, then the jury must find intent to kill if they cannot agree that the defendant was the actual killer. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) In such cases, the court should then give both bracketed paragraphs.

Do not give this instruction if accomplice liability is not at issue in the case.

Related Instructions

CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990.*

CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).*

AUTHORITY

- Accomplice Intent Requirement. Pen. Code, § 190.2(c).
- Constitutional Standard for Intent by Accomplice. *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].

Secondary Sources

3 Witkin & Epstein, California. Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.14 (Matthew Bender).

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703. Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)

If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] of _____ <*insert felony murder special circumstance[s]*>, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life.

In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove either that the defendant intended to kill, or the People must prove all of the following:

1. The defendant was a major participant in the crime;

AND

2. When the defendant participated in the crime, (he/she) acted with reckless indifference to human life.

[A person *acts with reckless indifference to human life* when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death.]

[The People do not have to prove that the actual killer acted with intent to kill or with reckless indifference to human life in order for the special circumstance[s] of _____ <*insert felony-murder special circumstance[s]*> to be true.]

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find either that the defendant acted with intent to kill or you must find that the defendant acted with reckless indifference to human life and was a major participant in the crime.]

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she)

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acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance[s] of _____ <*insert felony murder special circumstance[s]*> to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. *(Ibid.)*

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127]. The current law provides that the actual killer does not have to act with intent to kill unless the special circumstance specifically requires intent. (Pen. Code, § 190.2(b).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer was a major participant and acted with intent to kill or with reckless indifference to human life. (Pen. Code, § 190.2(d); *People v. Estrada* (1995) 11 Cal.4th 568, 571 [46 Cal.Rptr.2d 586, 904 P.2d 1197].)

Use this instruction for any case in which the jury could conclude that the defendant was an accomplice to a killing that occurred after June 5, 1990, when the felony-murder special circumstance is charged.

Give the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

If the jury could convict the defendant either as a principal or as an accomplice, the jury must find intent to kill or reckless indifference if they

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cannot agree that the defendant was the actual killer. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) In such cases, the court should give both the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer, and the bracketed paragraph that begins with "[I]f you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer . . . ."

The court does not have a sua sponte duty to define "reckless indifference to human life." (*People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197].) However, this "holding should not be understood to discourage trial courts from amplifying the statutory language for the jury." (*Id.* at p. 579.) The court may give the bracketed definition of reckless indifference if requested.

Do not give this instruction if accomplice liability is not at issue in the case.

AUTHORITY

- Accomplice Intent Requirement, Felony Murder. Pen. Code, § 190.2(d).
- Reckless Indifference to Human Life. *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Constitutional Standard for Intent by Accomplice. *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.14 (Matthew Bender).

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704. Special Circumstances: Circumstantial Evidence—Sufficiency

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Before you may rely on circumstantial evidence to conclude that a special circumstance allegation is true, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find that a special circumstance allegation is true, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the special circumstance allegation is true. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the special circumstance allegation is true and another reasonable conclusion supports a finding that it is not true, you must conclude that the allegation was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].)

Give CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*, with this instruction.

The Supreme Court has held that it is appropriate to give an instruction specifically tailored to the use of circumstantial evidence in determining the truth of a special circumstance allegation. (*People v. Maury* (2003) 30 Cal.4th 342, 428 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Hughes* (2002) 27 Cal.4th 287, 346 [116 Cal.Rptr.2d 401, 39 P.3d 432]; *People v.*

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Lewis (2001) 25 Cal.4th 610, 653 [106 Cal.Rptr.2d 629, 22 P.3d 392].) However, the court is not *required* to give this instruction if it has also given the more general instruction on circumstantial evidence. (*People v. Hines* (1997) 15 Cal.4th 997, 1051 [64 Cal.Rptr.2d 594, 938 P.2d 388]; *People v. Lewis, supra,* 25 Cal.4th at p. 653; see CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*.)

Related Instructions

CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*.

CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*.

CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*.

CALCRIM No. 705, *Special Circumstances: Circumstantial Evidence—Intent or Mental State*.

AUTHORITY

- Duty to Instruct on Circumstantial Evidence Generally. *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1]; *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].
- Appropriate to Instruct on Special Circumstance. *People v. Maury* (2003) 30 Cal.4th 342, 428 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Hughes* (2002) 27 Cal.4th 287, 346 [116 Cal.Rptr.2d 401, 39 P.3d 432]; *People v. Lewis* (2001) 25 Cal.4th 610, 653 [106 Cal.Rptr.2d 629, 22 P.2d 392].
- Instruction Duplicative, Not Required. *People v. Lewis* (2001) 25 Cal.4th 610, 653 [106 Cal.Rptr.2d 629, 22 P.2d 392]; *People v. Hines* (1997) 15 Cal.4th 997, 1051 [64 Cal.Rptr.2d 594, 938 P.2d 388].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence,* § 83.03, Ch. 85, *Submission to Jury and Verdict,* § 85.03[2][a] (Matthew Bender).

(New January 2006)

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705. Special Circumstances: Circumstantial Evidence—Intent or Mental State

In order to prove the special circumstance[s] of _____ <*insert special circumstance[s] with intent requirement*>, the People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular intent or mental state. The instruction for (each/the) special circumstance explains the intent or mental state required.

An intent or mental state may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not have the required intent or mental state, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v.*

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Yrigoyen (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].)

Give CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*, with this instruction.

The Supreme Court has held that it is appropriate to give an instruction specifically tailored to the use of circumstantial evidence in determining the truth of a special circumstance allegation. (*People v. Maury* (2003) 30 Cal.4th 342, 428 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Hughes* (2002) 27 Cal.4th 287, 346 [116 Cal.Rptr.2d 401, 39 P.3d 432]; *People v. Lewis* (2001) 25 Cal.4th 610, 653 [106 Cal.Rptr.2d 629, 22 P.3d 329].) However, the court is not *required* to give this instruction if it has also given the more general instruction on circumstantial evidence. (*People v. Hines* (1997) 15 Cal.4th 997, 1051 [64 Cal.Rptr.2d 594, 938 P.2d 388]; *People v. Lewis, supra,* 25 Cal.4th at p. 653; see CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*.)

If intent or mental state is the only element of the special circumstance that rests substantially on circumstantial evidence, then this instruction should be given in place of CALCRIM No. 704, *Special Circumstances: Circumstantial Evidence—Sufficiency*. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280]). If other elements of the special circumstance also rest substantially or entirely on circumstantial evidence, the court may give the more general instruction, CALCRIM No. 704, instead of this instruction. (*People v. Hughes, supra,* 27 Cal.4th at p. 347.) The court may choose to give both instructions (CALCRIM Nos. 704 and 705) and may also choose to give both circumstantial evidence instructions for non-special circumstance cases (CALCRIM Nos. 224 and 225). (See *People v. Maury, supra,* 30 Cal.4th at p. 428.)

Related Instructions

CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*.

CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*.

CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*.

CALCRIM No. 704, *Special Circumstances: Circumstantial Evidence—Sufficiency*.

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AUTHORITY

- Duty to Instruct on Circumstantial Evidence Generally. *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1]; *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].
- Appropriate to Instruct on Special Circumstance. *People v. Maury* (2003) 30 Cal.4th 342, 428 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Hughes* (2002) 27 Cal.4th 287, 346 [116 Cal.Rptr.2d 401, 39 P.2d 432]; *People v. Lewis* (2001) 25 Cal.4th 610, 653 [106 Cal.Rptr.2d 629, 22 P.3d 392].
- Instruction Duplicative, Not Required. *People v. Lewis* (2001) 25 Cal.4th 610, 653 [106 Cal.Rptr.2d 401, 39 P.2d 432]; *People v. Hines* (1997) 15 Cal.4th 997, 1051 [64 Cal.Rtpr.2d 594, 938 P.2d 388].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.14 (Matthew Bender).

(New January 2006)

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706. Special Circumstances: Jury May Not Consider Punishment

In your deliberations, you may not consider or discuss penalty or punishment in any way when deciding whether a special circumstance, or any other charge, has been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury not to consider penalty or punishment when deciding on the special circumstances or other charges. (*People v. Robertson* (1982) 33 Cal.3d 21, 36 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Holt* (1984) 37 Cal.3d 436, 458 [208 Cal.Rptr. 547, 690 P.2d 1207] [jury may not consider punishment in deciding on special circumstances].)

AUTHORITY

- Duty to Instruct. *People v. Robertson* (1982) 33 Cal.3d 21, 36 [188 Cal.Rptr. 77, 655 P.2d 279].
- Jury May Not Consider Punishment. *People v. Holt* (1984) 37 Cal.3d 436, 458.

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707. Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice

In order to prove the special circumstance[s] of _____ <*insert special circumstance[s] requiring proof of additional crime*>, the People must prove that the defendant committed _____ <*insert crime[s] (other than murder) that must be proved*>. The People have presented the (statement[s]/ [or] testimony) of _____ <*insert name[s] of witness[es]*> on this issue.

Before you may consider the (statement[s]/ [or] testimony) of _____ <*insert name[s] of witness[es]*> on the question of whether the special circumstance[s] (was/were) proved, you must decide whether (he/she/they) (was/were) [an] accomplice[s]. A person is an *accomplice* if he or she is subject to prosecution for the identical offense alleged against the defendant. Someone is subject to prosecution if he or she personally committed the offense or if:

1. **He or she knew of the criminal purpose of the person who committed the offense;**

AND

2. **He or she intended to, and did, in fact, (aid, facilitate, promote, encourage, or instigate the commission of the offense[,]/ [or] participate in a criminal conspiracy to commit the offense).**

The burden is on the defendant to prove that it is more likely than not that _____ <*insert name[s] of witness[es]*> (was/ were) subject to prosecution for the identical offense.

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute (the person/those) who commit[s] that crime is not an accomplice.]

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[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:

1. **The nature and effect of the criminal conduct;**
2. **That the conduct was wrongful and forbidden;**

AND

3. **That (he/she) could be punished for participating in the conduct.]**

If you find that _____ <*insert name[s] of witness[es]*> **(was/were) [an] accomplice[s], then you may not find that the special circumstance[s] of** _____ <*insert special circumstance[s] requiring proof of additional crime*> **(is/are) true based on (his/her/their) (statement[s]/ [or] testimony) alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:**

1. **The accomplice's (statement[s]/ [and] testimony) (is/are) supported by other evidence that you believe;**
2. **That supporting evidence is independent of the accomplice's (statement[s]/ [and] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of** _____ <*insert crime[s] (other than murder) that must be proved*>**.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed _____ <*insert crime[s] (other than murder) that must be proved*>**, and it does not need to support every fact (mentioned by the witness in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of** _____ <*insert crime[s] (other than murder) that must be proved*>**.**

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[The evidence needed to support the (statement[s]/ [or] testimony) of one accomplice cannot be provided by the (statement[s]/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

If you decide that _____ <*insert name[s] of witness[es]*> (was/ were) not [an] accomplice[s], you should evaluate (his/her/their) (statement[s]/ or] testimony) as you would that of any other witness.

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730].) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." *(Ibid.)*

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr.

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340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103–106 [7 Cal.Rptr.3d 710, 96 P.3d 30].)

When the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, give CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.

Give the bracketed paragraph beginning "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness is an undercover police officer or an unwitting assistant.

Give the bracketed paragraph beginning "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

Related Instructions

CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.

CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

AUTHORITY

- Duty to Instruct. Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

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- Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony. *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defendant's Burden of Proof. *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697], and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 89].
- Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin & Epstein, California Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

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3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 461.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.03, Ch. 85, *Submission to Jury and Verdict,* § 85.03[2][d], Ch. 87, *Death Penalty,* § 87.23[4][b] (Matthew Bender).

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708. Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice

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In order to prove the special circumstance[s] of _____ <*insert special circumstance[s] requiring proof of additional crime*>, the People must prove that the defendant committed _____ <*insert crime[s] (other than murder) that must be proved*>. The People have presented the (statement[s]/ [or] testimony) of _____ <*insert name[s] of witness[es]*> on this issue.

If the crime[s] of _____ <*insert crime[s]*> (was/were) committed, then _____ <*insert name[s] of witness[es]*> (was/were) [an] accomplice[s] to (that/those) crime[s].

You may not find that the special circumstance[s] of _____ <*insert special circumstance[s] requiring proof of additional crime*> is true based on the (statement[s]/ [or] testimony) of an accomplice alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:

1. **The accomplice's (statement[s]/ [and] testimony) (is/are) supported by other evidence that you believe;**
2. **That supporting evidence is independent of the accomplice's (statement[s]/ [and] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____ <*insert crime[s] (other than murder) that must be proved*>.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed _____ <*insert crime[s] (other than murder) that must be proved*>, and it does not need to support every fact (mentioned by the witness in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of _____ <*insert crime[s] (other than murder) that must be proved*>.

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[The evidence needed to support the (statement[s]/ [or] testimony) of one accomplice cannot be provided by the (statement[s]/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730].) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." *(Ibid.)*

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give 707, *Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice*

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is

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an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution.

Related Instructions

CALCRIM No. 707, *Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice*.

CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

CALCRIM No. 335, *Accomplice Testimony; No Dispute Whether Witness Is Accomplice*.

AUTHORITY

- Duty to Instruct. Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr. 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony. *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697], and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44].

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- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

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3 Witkin & Epstein, California Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 461.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.03, Ch. 85, *Submission to Jury and Verdict,* § 85.03[2][d], Ch. 87, *Death Penalty,* § 87.23[4][b] (Matthew Bender).

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(ii) Special Circumstances

720. Special Circumstances: Financial Gain, Pen. Code, § 190.2(a)(1)

The defendant is charged with the special circumstance of murder for financial gain.

To prove that this special circumstance is true, the People must prove that:

1. The defendant intended to kill;

[AND]

2. The killing was carried out for financial gain(;/.)

<Give element 3 only if robbery-murder also charged; see Bench Notes>

[AND

3. (The defendant/_____ *<insert name or description of principal if not defendant>*) **expected the financial gain to result from the death of** _____ *<insert name of decedent>***.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

The third element should only be given when the defendant is also charged with a robbery-murder special circumstance. (*People v. Bigelow* (1984) 37 Cal.3d 731, 751 [209 Cal.Rptr. 328, 691 P.2d 994]; *People v. Howard* (1988) 44 Cal.3d 375, 409 [243 Cal.Rptr. 842, 749 P.2d 279].) When both are charged, there is a risk that the jury will read the financial gain circumstance broadly, causing it to overlap with the robbery-murder special circumstance. (*People v. Bigelow, supra,* 37 Cal.3d at p. 751.) In such

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cases, the financial gain special circumstance is subject to "a limiting construction under which . . . [it] applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." *(Ibid.)*

The third element **should not** be given if the robbery-murder special circumstance is not charged. (*People v. Howard* (1988) 44 Cal.3d 375, 410 [243 Cal.Rptr. 842, 749 P.2d 279].) "*Bigelow's* formulation should be applied when it is important to serve the purposes underlying that decision, but . . . it is not intended to restrict construction of 'for financial gain' when overlap is *not* a concern." (*Ibid.* [emphasis in original].) In such cases, the unadorned language of the statute is sufficiently clear for the jury to understand. (*Id.* at pp. 408–409; *People v. Noguera* (1992) 4 Cal.4th 599, 635–637 [15 Cal.Rptr.2d 400, 842 P.2d 1160].)

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(1).
- Cannot Overlap With Robbery Murder. *People v. Bigelow* (1984) 37 Cal.3d 731, 751 [209 Cal.Rptr. 328, 691 P.2d 994]; *People v. Montiel* (1985) 39 Cal.3d 910, 927 [218 Cal.Rptr. 572, 705 P.2d 1248].
- Language of Statute Sufficient If No Robbery-Murder Charge. *People v. Howard* (1988) 44 Cal.3d 375, 410 [243 Cal.Rtpr. 842, 749 P.2d 279]; *People v. Noguera* (1992) 4 Cal.4th 599, 635–637 [15 Cal.Rptr.2d 400, 842 P.2d 1160].
- Expectation of Financial Benefit. *People v. Howard* (1988) 44 Cal.3d 375, 409 [243 Cal.Rptr. 842, 749 P.2d 279]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1025 [254 Cal.Rptr. 586, 766 P.2d 1]; *People v. Noguera* (1992) 4 Cal.4th 599, 636 [15 Cal.Rptr.2d 400, 842 P.2d 1160].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 441.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[1], 87.14 (Matthew Bender).

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RELATED ISSUES

Financial Gain Need Not Be Primary or Sole Motive

"[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." (*People v. Howard* (1988) 44 Cal.3d 375, 409 [243 Cal.Rptr. 842, 749 P.2d 279]; *People v. Noguera* (1992) 4 Cal.4th 599, 636 [15 Cal.Rptr.2d 400, 842 P.2d 1160].) Financial gain does not have to be "a 'dominant,' 'substantial,' or 'significant' motive." (*People v. Noguera, supra,* 4 Cal.4th at pp. 635–636 [special circumstance applied where defendant both wanted to kill wife in order to be with another woman and to inherit her estate]; *People v. Michaels* (2002) 28 Cal.4th 486, 519 [122 Cal.Rptr.2d 285, 49 P.3d 1032] [applied where defendant wanted to protect friend from abuse by victim and help friend get proceeds of insurance policy].)

Need Not Actually Receive Financial Gain

"Proof of actual pecuniary benefit to the defendant from the victim's death is neither necessary nor sufficient to establish the financial-gain special circumstance." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1025–1026 [254 Cal.Rptr. 586, 766 P.2d 1] [financial gain element satisfied where defendant believed death would relieve him of debt to victim even though legally not true]; *People v. Noguera* (1992) 4 Cal.4th 599, 636 [15 Cal.Rptr.2d 400, 842 P.2d 1160]; *People v. Michaels* (2002) 28 Cal.4th 486, 519 [122 Cal.Rptr.2d 285, 49 P.3d 1032] [satisfied even though insurance company refused to pay].)

Defendant May Act for Another to Receive Financial Gain

"Defendant's other proffered instructions were similarly flawed. His second alternative would not have embraced the prospect that the killing was committed with the expectation that *another* would benefit financially . . . ." (*People v. Howard* (1988) 44 Cal.3d 375, 409, fn. 9 [243 Cal.Rptr. 842, 749 P.2d 279]] [emphasis in original]; see also *People v. Michaels* (2002) 28 Cal.4th 486, 519 [122 Cal.Rptr.2d 285, 49 P.3d 1032] [defendant killed for friend to receive insurance proceeds].)

Financial Gain Need Not Be Cash

"[A] murder for the purpose of avoiding a debt is a murder for financial gain . . . ." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1025 [254 Cal.Rptr. 586, 766 P.2d 1] [avoidance of child support payments]; see also *People v. Silberman* (1989) 212 Cal.App.3d 1099, 1114–1115 [261

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Cal.Rptr. 45] [prevent discovery of embezzlement].) "A murder for purposes of eliminating a business competitor is a murder for financial gain . . . ." (*People v. McLead* (1990) 225 Cal.App.3d 906, 918 [276 Cal.Rptr. 187] [elimination of rival drug dealer].) "[I]t makes little difference whether the coin of the bargain is money or something else of value: the vice of the agreement is the same, the calculated hiring of another to commit premeditated murder." (*People v. Padilla* (1995) 11 Cal.4th 891, 933 [47 Cal.Rptr.2d 426, 906 P.2d 388] [payment in drugs sufficient].)

Murder for Hire: Hirer Need Not Receive Financial Gain

> [W]hen a person commits murder for hire, the one who did the hiring is guilty of the financial gain special circumstance only as an *accomplice*. (See, e.g., *People v. Bigelow, supra*, 37 Cal.3d at p. 750, fn. 11 [construing the 1978 law].) Moreover, in this case, before defendant could be found subject to the financial gain special circumstance as an accomplice, the jury was required to find that defendant had the intent to kill. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1142 [290 Cal.Rptr. 585, 742 P.2d 1306] [". . . section 190.2(b) lays down a special rule for a certain class of first degree murderers: if the defendant is guilty as an aider and abetter, he must be proved to have acted with intent to kill before any special circumstance (with the exception of a prior murder conviction) can be found true."].)

(*People v. Padilla* (1995) 11 Cal.4th 891, 933 [47 Cal.Rptr.2d 426, 906 P.2d 388] [emphasis in original]; see also *People v. Bigelow* (1984) 37 Cal.3d 731, 751, fn. 11 [209 Cal.Rptr. 328, 691 P.2d 994]; *People v. Freeman* (1987) 193 Cal.App.3d 337, 339 [238 Cal.Rptr. 257].)

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721. Special Circumstances: Multiple Murder Convictions (Same Case), Pen. Code, § 190.2(a)(3)

The defendant is charged with the special circumstance of having been convicted of more than one murder in this case.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant has been convicted of at least one charge of first degree murder in this case;**

AND

2. **The defendant has also been convicted of at least one additional charge of either first or second degree murder in this case.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court must submit the multiple-murder special circumstance to the jury unless the defendant has specifically waived jury trial on the special circumstance. (*People v. Marshall* (1996) 13 Cal.4th 799, 850 [55 Cal.Rptr.2d 347, 919 P.2d 1280].)

Intent to kill is not required for the actual killer but is required for an accomplice. If the evidence raises the issue of accomplice liability, the court has a **sua sponte** duty to instruct on that issue. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) Give CACLCRIM No. 702, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder*. If the homicide occurred prior to June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990*.

In a case in which the prosecution seeks the death penalty, only one special circumstance of multiple murder may be alleged. (*People v. Harris* (1984) 36 Cal.3d 36, 67 [201 Cal.Rptr. 782, 679 P.2d 433]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1150 [240 Cal.Rptr. 585, 742 P.2d 1306].)

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AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(3).
- One Special Circumstance May Be Alleged When Death Penalty Sought. *People v. Harris* (1984) 36 Cal.3d 36, 67 [201 Cal.Rptr. 782, 679 P.2d 433]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1150 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Must Submit to Jury. *People v. Marshall* (1996) 13 Cal.4th 799, 850 [55 Cal.Rptr.2d 347, 919 P.2d 1280].
- Intent to Kill Not Required for Actual Killer. *People v. Anderson* (1987) 43 Cal.3d 1104, 1150 [240 Cal.Rptr. 585, 742 P.2d 1306].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 440.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[3] (Matthew Bender).

RELATED ISSUES

Applies to Killing of Woman and Fetus

Application of the multiple-murder special circumstance to the killing of a woman and her unborn fetus is constitutional. (*People v. Dennis* (1998) 17 Cal.4th 468, 510 [71 Cal.Rptr.2d 680, 950 P.2d 1035].)

One Count of First Degree Murder Required

The defendant must be convicted of one count of first degree murder for this special circumstance to apply. (*People v. Williams* (1988) 44 Cal.3d 883, 923 [245 Cal.Rptr. 336, 751 P.2d 395]; *People v. Cooper* (1991) 53 Cal.3d 771, 828 [281 Cal.Rptr. 90, 809 P.2d 865].) However, the additional murder or murders may be second degree. (See *People v. Miller* (1990) 50 Cal.3d 954, 995 [269 Cal.Rptr. 492, 790 P.2d 1289].)

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722. Special Circumstances: By Means of Destructive Device, Pen. Code, § 190.2(a)(4) & (6)

The defendant is charged with the special circumstance of murder by use of (a/an) (bomb[,]/ [or] explosive[,]/ [or] destructive device).

To prove that this special circumstance is true, the People must prove that:

1. **The murder was committed by using (a/an) (bomb[,]/ [or] explosive[,]/ [or] destructive device);**

<Alternative 2A—device planted, Pen. Code, § 190.2(a)(4)>

[2. The (bomb[,]/ [or] explosive[,]/ [or] destructive device) was planted, hidden, or concealed in (a/an) (place[,]/ [or] area[,]/ [or] dwelling[,]/ [or] building[,]/ [or] structure);]

<Alternative 2B—device mailed or delivered, Pen. Code, § 190.2(a)(6)>

[2. The defendant (mailed or delivered[,]/ [or] attempted to mail or deliver[,]/ [or] caused to be mailed or delivered) the (bomb[,]/ [or] explosive[,]/ [or] destructive device);]

AND

3. **The defendant knew, or reasonably should have known, that (his/her) actions would create a great risk of death to one or more human beings.**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) that is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an explosive.]**

[A *destructive device* is _____ *<insert definition supported by evidence from Pen. Code, § 12301>***.]**

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[_____ <*insert type of destructive device from Pen. Code, § 12301*> is a destructive device.]

[For the purpose of this special circumstance, *delivery* of (a/an) (bomb[,]/ [or] explosive[,]/ [or] destructive device) includes throwing it.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Intent to kill is not required for the actual killer but is required for an accomplice. If the evidence raises the issue of accomplice liability, the court has a **sua sponte** duty to instruct on that issue. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) Give CALCRIM No. 702, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder*. If the homicide occurred prior to June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990.*

In element 2, give alternative 2A, stating that the device was "planted," if the defendant is charged with the special circumstance under Penal Code section 190.2(a)(4). Give alternative 2B, stating that the device was "mailed or delivered," if the defendant is charged with the special circumstance under Penal Code section 190.2(a)(6).

Give the bracketed paragraphs defining "explosive" if an explosive was used. (Health & Safety Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 603 [268 Cal.Rptr. 399, 789 P.2d 127].) Give the bracketed definition of "destructive device," inserting the appropriate description from Penal Code section 12301, if a device covered by that statute was used. If the case involves a specific explosive listed in Health and Safety Code section 12000 or a specific destructive device listed in Penal Code section 12301, the court may also give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "Dynamite is an explosive." However, the court may not instruct the jury that the defendant used an explosive. For example, the court may not state that "the defendant used an explosive, dynamite," or "the material used by the

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defendant, dynamite, is an explosive." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A *bomb* is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

Give the bracketed sentence stating that "deliver" includes throwing if the facts demonstrate the item was thrown. (*People v. Snead* (1993) 20 Cal.App.4th 1088, 1095 [24 Cal.Rptr.2d 922].)

AUTHORITY

- Special Circumstance: Planting Device. Pen. Code, § 190.2(a)(4).
- Special Circumstance: Mailing or Delivering Device. Pen. Code, § 190.2(a)(6).
- Explosive Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 603 [268 Cal.Rptr. 399, 789 P.2d 127].
- Destructive Device Defined. Penal Code, § 12301.

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 444.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[4], [6] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][ii] (Matthew Bender).

RELATED ISSUES

Gasoline Not an Explosive

"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v.*

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Clark (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127] [gasoline, by its nature, not an explosive even where used to ignite a fire].)

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723. Special Circumstances: Murder to Prevent Arrest or Complete Escape, Pen. Code, § 190.2(a)(5)

The defendant is charged with the special circumstance of murder (to prevent arrest/ [or] to escape from custody).

To prove that this special circumstance is true, the People must prove that:

1. **[The murder was committed to avoid or prevent a lawful arrest(./;)]**

[OR

2.] [The murder was committed while completing or attempting to complete an escape from lawful custody.]

<A. Lawful Arrest>

[In order for a killing to be committed for the purpose of avoiding or preventing a lawful arrest, a lawful arrest must be [or appear to be] imminent.]

[Instruction 2670 explains when an officer is lawfully arresting someone.]

<B. Escape From Custody>

[A killing is committed *while completing or attempting to complete escape* from lawful custody if a person is killed during the escape itself or while the prisoner[s] (is/are) fleeing from the scene.

A killing is not committed *while completing or attempting to complete escape* if the prisoner[s] (has/have) actually reached a temporary place of safety before the killing.]

[*Lawful custody* includes (confinement/placement) in (county jail/ prison/the California Youth Authority/work furlough/_____ *<insert name or description of other detention facility, see Pen. Code, § 4532>***. [A person is in lawful custody if he or she has been entrusted to the custody of an officer or other individual during a temporary release from the place of confinement.]]**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Intent to kill is not required for the actual killer but is required for an accomplice. If the evidence raises the issue of accomplice liability, the court has a **sua sponte** duty to instruct on that issue. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) Give CALCRIM No. 702, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder*. If the homicide occurred prior to June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990.*

Give the bracketed paragraph stating that the arrest must be "imminent" only if the evidence does not clearly establish that an arrest would have been made in the near future. (See *People v. Bigelow* (1984) 37 Cal.3d 731, 752 [209 Cal.Rptr. 328, 691 P.2d 994]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1300–1301 [18 Cal.Rptr.2d 796, 850 P.2d 1].) For example, it may be appropriate to instruct that the arrest must be imminent if no peace officer is present or if the decedent is not a peace officer. (See *People v. Cummings, supra,* 4 Cal.4th at pp. 1300–1301; but see *People v. Vorise* (1999) 72 Cal.App.4th 312, 322 [85 Cal.Rptr.2d 12].)

If the lawfulness of the arrest is an issue, give relevant portion of CALCRIM No. 2670, *Lawful Performance: Peace Officer*, and the bracketed sentence telling the jury that CALCRIM No. 2670 explains lawful arrest.

Give the bracketed paragraphs defining "completing or attempting to complete escape" if there is an issue in the case about whether the defendant had reached a temporary place of safety prior to the killing. (See *People v. Bigelow* (1984) 37 Cal.3d 731, 754 [209 Cal.Rptr. 328, 691 P.2d 994].)

Give the bracketed paragraph explaining lawful custody if there is an issue about whether the defendant was in lawful custody. (See Pen. Code, § 4532; *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952].)

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AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(5).
- Arrest Must Be Imminent. *People v. Bigelow* (1984) 37 Cal.3d 731, 752 [209 Cal.Rptr. 328, 691 P.2d 994]; *People v. Coleman* (1989) 48 Cal.3d 112, 146 [255 Cal.Rptr. 813, 768 P.2d 32]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1300–1301 [18 Cal.Rptr.2d 796, 850 P.2d 1].
- Killing During Escape Must Be During Hot Pursuit. *People v. Bigelow* (1984) 37 Cal.3d 731, 754 [209 Cal.Rptr. 328, 691 P.2d 994].
- Lawful Custody. See Pen. Code, § 4532 (escape from custody); *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 442.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[5] (Matthew Bender).

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724. Special Circumstances: Murder of Peace Officer, Federal Officer, or Firefighter, Pen. Code, § 190.2(a)(7), (8) & (9)

The defendant is charged with the special circumstance of murder of a (peace officer/federal law enforcement officer/ firefighter).

To prove that this special circumstance is true, the People must prove that:

1. _____ <*insert officer's name, excluding title*> **was a (peace officer/federal law enforcement officer/firefighter) [lawfully performing (his/her) duties as a (peace officer/ federal law enforcement officer/firefighter)];**
2. **The defendant intended to kill** _____ <*insert officer's name, excluding title*>**;**

AND

<*Alternative 3A—killing during performance of duties*>

[3. When _____ <*insert officer's name, excluding title*> **was killed, the defendant knew, or reasonably should have known, that** _____ <*insert officer's name, excluding title*> **was a (peace officer/federal law enforcement officer/ firefighter) who was performing (his/her) duties.]**

<*Alternative 3B—killing in retaliation*>

[3. _____ <*insert officer's name, excluding title*> **was killed in retaliation for the performance of (his/her) official duties.]**

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

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[The duties of (a/an) _____ <*insert title of peace officer*> include _____ <*insert job duties*>**.]**

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

<*When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.*>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

"Lawful performance" by the officer is not an element when the prosecution's theory is that the officer was killed in retaliation for performing his or her duties but is an element when the theory is that the officer was killed while engaging in his or her duties. If the prosecution's theory is that the killing occurred while the decedent was carrying out official duties, give the bracketed phrase "lawfully performing (his/her) duties" in element 1 and give alternative 3A. If the prosecution's theory is that the killing was in retaliation for the officer's performance of his or her duties, do not give the bracketed language in element 1 and give alternative 3B. The retaliation theory does not apply to the killing of a firefighter. (Pen. Code, § 190.2(a)(9).)

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an

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engaged-in-duty element." *(Ibid.)* If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

Penal Code section 190.2(a)(7) defines "peace officer" as "defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12."

Penal Code section 190.2(a)(9) defines "firefighter" "as defined in Section 245.1."

If the decedent was a federal law enforcement officer or agent, then the term "federal law enforcement officer" may need to be defined for the jury depending on the decedent's position.

The court may give the bracketed sentence that begins, "The duties of (a/an) _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

AUTHORITY

- Special Circumstance: Peace Officer. Pen. Code, § 190.2(a)(7).

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- Special Circumstance: Federal Officer. Pen. Code, § 190.2(a)(8).
- Special Circumstance: Firefighter. Pen. Code, § 190.2(a)(9).
- Engaged in Performance of Duties. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, §§ 455, 456.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[7], [8], [9], 87.14 (Matthew Bender).

RELATED ISSUES

Reasonable Knowledge Standard

Application of the special circumstance to a defendant who "reasonably should have known" that the decedent was a peace officer is constitutional. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 781–782 [230 Cal.Rptr. 667, 726 P.2d 113].)

> [I]n appropriate cases it would be proper for the court to instruct that a defendant may not be found guilty of the special circumstance at issue here (even if he reasonably should have known his victim was a peace officer engaged in the performance of his duty) if, by reason of *non-self-induced* "diminished capacity," defendant was *unable actually to know* the status of his victim.

(*Id.* at p. 781, fn. 18 [emphasis in original].)

Such an instruction is not warranted in a case where the defendant is voluntarily intoxicated or has otherwise "self-induced diminished capacity." (*People v. Brown* (1988) 46 Cal.3d 432, 445, fn. 7 [250 Cal.Rptr. 604, 758 P.2d 1135].)

See the Related Issues section to CALCRIM No. 2670, *Lawful Performance: Peace Officer.*

(New January 2006)

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725. Special Circumstances: Murder of Witness, Pen. Code, § 190.2(a)(10)

The defendant is charged with the special circumstance of murder of a witness.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended to kill _____ <*insert name of decedent*>;**
2. **_____ <*insert name of decedent*> was a witness to a crime;**
3. **The killing was not committed during the commission [or attempted commission] of the crime to which _____ <*insert name of decedent*> was a witness;**

AND

4. **The defendant intended that _____ <*insert name of decedent*> be killed (to prevent (him/her) from testifying in a (criminal/ [or] juvenile) proceeding/ [or] in retaliation for (his/her) testimony in a (criminal/ [or] juvenile) proceeding).**

[A killing is committed *during the commission [or attempted commission] of a crime* if the killing and the crime are part of one continuous transaction. The continuous transaction may occur over a period of time or in more than one location.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

The last bracketed paragraph should be given if there is evidence that the killing and the crime witnessed were part of one continuous transaction. The court may also modify and give, on request, CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. (*People v. Cavitt*

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(2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Silva* (1988) 45 Cal.3d 604, 631 [247 Cal.Rptr. 573, 754 P.2d 1070].)

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(10).
- Continuous Transaction. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Silva* (1988) 45 Cal.3d 604, 631 [247 Cal.Rptr. 573, 754 P.2d 1070]; *People v. Benson* (1990) 52 Cal.3d 754, 785 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Beardslee* (1991) 53 Cal.3d 68, 95 [279 Cal.Rptr. 276, 806 P.2d 1311].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 457.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[10], 87.14 (Matthew Bender).

RELATED ISSUES

Purpose of Killing

In order for this special circumstance to apply, the defendant must kill the witness for the purpose of preventing him or her from testifying or in retaliation for his or her testimony. (*People v. Stanley* (1995) 10 Cal.4th 764, 800 [42 Cal.Rptr.2d 543, 897 P.2d 481].) However, this does not have to be the sole or predominant purpose of the killing. (*Ibid.; People v. Sanders* (1990) 51 Cal.3d 471, 519 [273 Cal.Rptr. 537, 797 P.2d 561].)

Victim Does Not Have to Be An Eyewitness or Important Witness

"[N]othing in the language of the applicable special circumstance or in our decisions applying this special circumstance supports the suggestion that the special circumstance is confined to the killing of an 'eyewitness,' as opposed to any other witness who might testify in a criminal proceeding." (*People v. Jones* (1996) 13 Cal.4th 535, 550 [54 Cal.Rptr.2d 42, 917 P.2d 1165].) "It is no defense to the special circumstance allegation that the victim was not an important witness in the criminal proceeding, so long as one of the defendant's purposes was to prevent the witness from testifying." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; see also *People v. Bolter* (2001) 90 Cal.App.4th 240,

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242–243 [108 Cal.Rptr.2d 760] [special circumstance applied to retaliation for testifying where witness's actual testimony was "innocuous"].)

Defendant Must Believe Victim Will Be Witness

"[S]ection 190.2, subd. (a)(10) is applicable if defendant *believes* the victim will be a witness in a criminal prosecution, whether or not such a proceeding is pending or about to be initiated." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018 [95 Cal.Rptr.2d 377] [emphasis in original]; see also *People v. Weidert* (1985) 39 Cal.3d 836, 853 [218 Cal.Rptr. 57, 705 P.2d 380] [abrogated by statutory amendment]; *People v. Sanders* (1990) 51 Cal.3d 471, 518 [273 Cal.Rptr. 537, 797 P.2d 561].)

"Continuous Transaction" in Context of Witness Special Circumstance

"[T]o establish one continuous criminal transaction, the time-lag between the first and second killing does not matter so much as whether the defendant shows a common criminal intent toward all the victims upon the initiation of the first criminal act. When that criminal intent toward all victims is present, the criminal transaction does not conclude until the killing of the final victim." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 655 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

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726. Special Circumstances: Murder of Judge, Prosecutor, Government Official, or Juror, Pen. Code, §§ 190.2(a)(11), (12), (13) & (20)

The defendant is charged with the special circumstance of murder of a (prosecutor/judge/government official/juror).

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended to kill** _____ <*insert name of decedent*>**;**
2. _____ <*insert name of decedent*> **was a (prosecutor/judge/government official/juror in** _____ <*insert name or description of local, state, or federal court of record in this or another state*>**);**

AND

3. **The defendant intended that** _____ <*insert name of decedent*> **be killed (to prevent (him/her) from performing (his/her) official duties as a (prosecutor/judge/government official/juror)/ [or] in retaliation for** _____**'s** <*insert name[s] of decedent[s]*> **performance of (his/her) official duties as a (prosecutor/judge/government official/juror)).**

[(A/An) _____ <*insert title of government official's position*> **is an (elected/appointed) government official.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

The jury must determine whether the decedent is a prosecutor, judge, juror, or government official. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "government official" (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are

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government officials"). *(Ibid.)* However, the court may not instruct the jury that the decedent was a government official as a matter of law (e.g., "Officer Reed was a government official"). *(Ibid.)*

AUTHORITY

- Special Circumstance: Prosecutor. Pen. Code, § 190.2(a)(11).
- Special Circumstance: Judge. Pen. Code, § 190.2(a)(12).
- Special Circumstance: Government Official. Pen. Code, § 190.2(a)(13).
- Special Circumstance: Juror. Pen. Code, § 190.2(a)(20).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 458.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[11], [12], [13], [20], 87.14 (Matthew Bender).

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727. Special Circumstances: Lying in Wait—Before March 8, 2000, Pen. Code, § 190.2(a)(15)

The defendant is charged with the special circumstance of murder committed while lying in wait.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed _____ <*insert name of decedent*>;**

AND

2. **The defendant committed the murder while lying in wait.**

A person commits murder while lying in wait if:

1. **He or she concealed his or her purpose from the person killed;**
2. **He or she waited and watched for an opportunity to act;**
3. **Immediately after watching and waiting, he or she made a surprise attack on the person killed from a position of advantage;**

AND

4. **He or she intended to kill the person by taking the person by surprise.**

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial and must show a state of mind equivalent to deliberation and premeditation.

The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if (he/she) decided to kill before committing the act that caused death.

In order for a murder to be committed while lying in wait, the attack must immediately follow the period of watching and waiting. The lethal acts must begin at and flow continuously

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from the moment the concealment and watchful waiting ends. If there is a detectable interval between the period of watching and waiting and the period during which the killing takes place, then the murder is not committed while lying in wait. If you have a reasonable doubt whether the murder was committed while lying in wait, you must find this special circumstance has not been proved.

[A person can conceal his or her purpose even if the person killed is aware of the other person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Prior to March 8, 2000, the lying in wait special circumstance required that the murder be committed "while" lying in wait. Effective March 8, 2000, the special circumstance was amended to require that the murder be committed "by means of" lying in wait. Use this instruction only for homicides alleged to have occurred prior to March 8, 2000. (See *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007 [181 Cal.Rptr. 486] ["while lying in wait" distinguished from "by means of lying in wait"]; *People v. Morales* (1989) 48 Cal.3d 527, 558 [257 Cal.Rptr. 64, 770 P.2d 244].)

For cases after March 8, 2000, use CALCRIM No. 728, *Special Circumstances: Lying in Wait—After March 7, 2000, Pen. Code, § 190.2(a)(15).* (*People v. Michaels* (2002) 28 Cal.4th 486, 516–517 [122 Cal.Rptr.2d 285, 49 P.3d 1032] [noting amendment to statute].)

Give the bracketed paragraph stating that physical concealment is not required if the evidence shows that the decedent was aware of the defendant's presence. (*People v. Morales* (1989) 48 Cal.3d 527, 554–556 [257 Cal.Rptr. 64, 770 P.2d 244].) Give the bracketed paragraph stating that concealment may be accomplished by ambush if the evidence shows an attack from a hidden position.

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AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(15) (before March 8, 2000).
- While Lying in Wait. *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007 [181 Cal.Rptr. 486]; *People v. Morales* (1989) 48 Cal.3d 527, 558 [257 Cal.Rptr. 64, 770 P.2d 244]; *People v. Michaels* (2002) 28 Cal.4th 486, 516–517 [122 Cal.Rptr.2d 285, 49 P.3d 1032].
- Physical Concealment Not Required. *People v. Morales* (1989) 48 Cal.3d 527, 554–556 [257 Cal.Rptr. 64, 770 P.2d 244].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 445.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[15][a], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][iv] (Matthew Bender).

RELATED ISSUES

Dual Purpose

"[I]f a person lies in wait intending first to rape and second to kill, then immediately proceeds to carry out that intent (or attempts to rape, then kills), the elements of the lying-in-wait special circumstance are met." (*People v. Carpenter* (1997) 15 Cal.4th 312, 389 [63 Cal.Rptr.2d 1, 953 P.2d 708].)

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728. Special Circumstances: Lying in Wait—After March 7, 2000, Pen. Code, § 190.2(a)(15)

The defendant is charged with the special circumstance of murder committed by means of lying in wait.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed _____ <*insert name of decedent*>;**

AND

2. **The defendant committed the murder by means of lying in wait.**

A person commits a murder by means of lying in wait if:

1. **He or she concealed his or her purpose from the person killed;**
2. **He or she waited and watched for an opportunity to act;**
3. **Then he or she made a surprise attack on the person killed from a position of advantage;**

AND

4. **He or she intended to kill the person by taking the person by surprise.**

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial and must show a state of mind equivalent to deliberation or premeditation.

The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if (he/she) decided to kill before committing the act that caused death.

[A person can conceal his or her purpose even if the person killed is aware of the other person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Effective March 8, 2000, the special circumstance was amended to require that the murder be committed "by means of" lying in wait rather than "while" lying in wait. (*People v. Michaels* (2002) 28 Cal.4th 486, 516–517 [122 Cal.Rptr.2d 185, 49 P.3d 1032] [noting amendment to statute]; *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 309 [129 Cal.Rptr.2d 324] [holding amended statute is not unconstitutionally vague].) Use this instruction for cases in which the alleged homicide occurred on or after March 8, 2000.

Give the bracketed paragraph stating that physical concealment is not required if the evidence shows that the decedent was aware of the defendant's presence. (*People v. Morales* (1989) 48 Cal.3d 527, 554–556 [257 Cal.Rptr. 64, 770 P.2d 244].) Give the bracketed paragraph stating that concealment may be accomplished by ambush if the evidence shows an attack from a hidden position.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(15).
- Amended Statute Not Unconstitutionally Vague. *People v. Superior Court of San Diego County (Bradway)* (2003) 105 Cal.App.4th 297, 309 [129 Cal.Rptr.2d 324].
- Physical Concealment Not Required. *People v. Morales* (1989) 48 Cal.3d 527, 554–556 [257 Cal.Rptr. 64, 770 P.2d 244].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 445.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[15][b], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][iv] (Matthew Bender).

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RELATED ISSUES

Dual Purpose

"[I]f a person lies in wait intending first to rape and second to kill, then immediately proceeds to carry out that intent (or attempts to rape, then kills), the elements of the lying-in-wait special circumstance are met." (*People v. Carpenter* (1997) 15 Cal.4th 312, 389 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

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729. Special Circumstances: Murder Because of Race, Religion, or Nationality, Pen. Code, § 190.2(a)(16)

The defendant is charged with the special circumstance of murder committed because of the deceased's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin).

To prove that this special circumstance is true, the People must prove that the defendant intended to kill because of the deceased person's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin).

[If the defendant had more than one reason to (commit[,]/ participate in[,]/ [or] aid and abet) the murder, the deceased person's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin) must have been a substantial factor motivating the defendant's conduct. A *substantial factor* is more than a trivial or remote factor, but it does not need to be the only factor that motivated the defendant.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Give the bracketed paragraph if there is evidence that the defendant had more than one reason to commit the murder. (*In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(16).
- Special Circumstance Constitutional. *People v. Sassounian* (1986) 182 Cal.App.3d 361, 413 [226 Cal.Rptr. 880]; *People v. Talamantez* (1985) 169 Cal.App.3d 443, 469 [215 Cal.Rptr. 542].
- "Because of" Defined. Pen. Code, § 190.03(c); *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896

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P.2d 1287]; *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 449.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[16], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[4][a][ii] (Matthew Bender).

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730. Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of murder committed while engaged in the commission of _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***.**

To prove that this special circumstance is true, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;**

<Give element 3 if defendant did not personally commit or attempt felony.>

[3. If the defendant did not personally commit [or attempt to commit] _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***, then a perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally commited [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;]**

(3/4). (The defendant/_____ *<insert name or description of person causing death if not defendant>***) did an act that caused the death of another person;**

[AND]

(4/5). The act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***] were part of one continuous transaction(;/.)**

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<Give element 5/6 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>

[AND

(5/6). There was a logical connection between the act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***]. The connection between the fatal act and the _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***] must involve more than just their occurrence at the same time and place.]**

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***, please refer to the separate instructions that I (will give/have given) you on (that/ those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/ have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.**

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aided and abetted/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **before or at the time of the act causing the death.]**

[In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **independent of the killing. If you find that the**

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defendant only intended to commit murder and the commission of _____ <*insert felony or felonies from Pen. Code, § 190.2(a)(17)*> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court also has a **sua sponte** duty to instruct on the elements of any felonies alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If the evidence raises the potential for accomplice liability, the court has a **sua sponte** duty to instruct on that issue. Give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)*. If the homicide occurred on or before June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990*.

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction.

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Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give bracketed element 6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 399, 789 P.2d 127].

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 p.2d 803]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

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The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined.*

Proposition 115 added Penal Code section 190.41, eliminating the corpus delicti rule for the felony-murder special circumstance. (Pen. Code, § 190.41; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].) If, however, the alleged homicide predates the effective date of the statute (June 6, 1990), then the court must modify this instruction to require proof of the corpus delicti of the underlying felony independent of the defendant's extrajudicial statements. (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 298.)

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(17).
- Specific Intent to Commit Felony Required. *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 88 [17 Cal.Rptr.3d 710, 96 P.3d 30] [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].

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- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Provocative Act Murder. *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].
- Concurrent Intent. *People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].
- Felony Cannot Be Incidental to Murder. *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].
- Instruction on Felony as Incidental to Murder. *People v. Kimble* (1988) 44 Cal.3d 480, 501 [244 Cal.Rptr. 148, 749 P.2d 803]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].
- Proposition 115 Amendments to Special Circumstance. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, §§ 450, 451, 452, 453.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[17] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][b] (Matthew Bender).

RELATED ISSUES

Applies to Felony Murder and Provocative Act Murder

"The fact that the defendant is convicted of murder under the application of the provocative act murder doctrine rather than pursuant to the felony-murder doctrine is irrelevant to the question of whether the murder qualified as a special-circumstances murder under former section 190.2,

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subdivision (a)(17). The statute requires only that the murder be committed while the defendant was engaged in the commission of an enumerated felony." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].)

Concurrent Intent to Kill and Commit Felony

"Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Mendoza* (2000) 24 Cal.4th 130, 183 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Clark* (1990) 50 Cal.3d 583, 608–609 [268 Cal.Rptr. 399, 789 P.2d 127].)

Multiple Special Circumstances May Be Alleged

The defendant may be charged with multiple felony-related special circumstances based on multiple felonies committed against one victim or multiple victims of one felony. (*People v. Holt* (1997) 15 Cal.4th 619, 682 [63 Cal.Rptr.2d 782, 937 P.2d 213]; *People v. Andrews* (1989) 49 Cal.3d 200, 225–226 [260 Cal.Rptr. 583, 776 P.2d 286].)

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731. Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill, Pen. Code, § 190.2(a)(17) (After March 8, 2000)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of kidnapping.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) kidnapping;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) kidnapping;**

<Give element 3 if defendant did not personally commit or attempt kidnapping.>

[3. If the defendant did not personally commit [or attempt to commit] kidnapping, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] kidnapping;]

(3/4). (The defendant/_____ *<insert name or description of person causing death if not defendant>*) **did an act that was a substantial factor in causing the death of another person;**

(4/5). The defendant intended that the other person be killed;

[AND]

(5/6). The act causing the death and the kidnapping [or attempted kidnapping] were part of one continuous transaction(;/.)

<Give element 7 if the court concludes it must instruct on causal relationship between kidnapping and death; see Bench Notes.>

[AND

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(6/7). There was a logical connection between the act causing the death and the kidnapping [or attempted kidnapping]. The connection between the fatal act and the kidnapping [or attempted kidnapping] must involve more than just their occurrence at the same time and place.]

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] kidnapping, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/ have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON UNDERLYING KIDNAPPING, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is **one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.**

There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of kidnapping was merely part of or incidental to the commission of that murder.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 9941 P.2d 752].) The court also has a **sua sponte** duty to instruct on the elements of the kidnapping alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)*.

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)***.**

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant committed or attempted to commit kidnapping, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on kidnapping.

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If the prosecution's theory is that the defendant aided and abetted or conspired to commit kidnapping, select one or both of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on kidnapping and on aiding and abetting and/or conspiracy with this instruction.

Bracketed element 7 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give bracketed element 7 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 7. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.)

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the

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committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined.*

Related Instructions

CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.

CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*.

CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

CALCRIM No. 1204, *Kidnapping During Carjacking*.

CALCRIM No. 1215, *Kidnapping*.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(17)(B), (H) & (M).
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 88 [17 Cal.Rptr.3d 710, 96 P.3d 30] [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].
- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 450.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[17], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[2][b], 142.14[3] (Matthew Bender).

(New January 2006)

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732. Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of arson that burned an inhabited structure.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) arson that burned an inhabited structure;**
2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) arson that burned an inhabited structure;**

<Give element 3 if defendant did not personally commit or attempt arson.>

[3. If the defendant did not personally commit [or attempt to commit] arson, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] arson that burned an inhabited structure;]

(3/4). The commission [or attempted commission] of the arson was a substantial factor in causing the death of another person;

(4/5). The defendant intended that the other person be killed;

(5/6). The act causing the death and the arson [or attempted arson] were part of one continuous transaction;

AND

(6/7). There was a logical connection between the act causing the death and the arson [or attempted arson]. The connection between the fatal act and the arson must involve more than just their occurrence at the same time and place.

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To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] arson that burned an inhabited structure, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved this special circumstance.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON UNDERLYING ARSON, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is **one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.**

There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of arson was merely part of or incidental to the commission of that murder.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court also has a **sua sponte** duty to

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instruct on the elements of the arson alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).*

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a sua sponte duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).*

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874 [11 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit arson, then select "committed [or attempted to commit]" in element

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1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on arson.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit arson, select one or both of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on arson and on aiding and abetting and/or conspiracy with this instruction.

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

Related Instructions

CALCRIM No. 1502, *Arson: Inhabited Structure*.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(17)(B), (H) & (M).
- Continuous Transaction Requirement. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763, P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].
- Logical Connection Required for Liability of Nonkiller. *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 450.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[17], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][b] (Matthew Bender).

(New January 2006)

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733. Special Circumstances: Murder With Torture, Pen. Code, § 190.2(a)(18)

The defendant is charged with the special circumstance of murder involving the infliction of torture.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended to kill _____ <*insert name of decedent*>;**
2. **The defendant also intended to inflict extreme physical pain and suffering on _____ <*insert name of decedent*> while that person was still alive;**
3. **The defendant intended to inflict such pain and suffering on _____ <*insert name of decedent*> for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

AND

<*Alternative A—on or after June 6, 1990*>

[4. The defendant did an act involving the infliction of extreme physical pain and suffering on _____ <*insert name of decedent*>.]

<*Alternative B—before June 6, 1990*>

[4. The defendant in fact inflicted extreme physical pain on _____ <*insert name of decedent*>.]

There is no requirement that the person killed be aware of the pain.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

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In element 4, always give alternative 4A unless the homicide occurred prior to June 6, 1990. (*People v. Davenport* (1985) 41 Cal.3d 247, 271 [221 Cal.Rptr. 794, 710 P.2d 861].) If the homicide occurred prior to June 6, 1990, give alternative 4B. For homicides after that date, alternative 4B should not be given. (*People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14 [36 Cal.Rptr.2d 474, 885 P.2d 887].)

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(18).
- Must Specifically Intend to Torture. *People v. Davenport* (1985) 41 Cal.3d 247, 265–266 [221 Cal.Rptr. 794, 710 P.2d 861]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1255 [278 Cal.Rptr. 640, 805 P.2d 899].
- Causation Not Required. *People v. Crittenden* (1994) 9 Cal.4th 83, 141–142 [36 Cal.Rptr.2d 474, 885 P.2d 887].
- Pain Not an Element. *People v. Davenport* (1985) 41 Cal.3d 247, 271 [221 Cal.Rptr. 794, 710 P.2d 861]; *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14. [36 Cal.Rptr.2d 474, 885 P.2d 887]
- Intent to Torture Need Not be Deliberate, and Premeditated. *People v. Cole* (2004) 33 Cal.4th 1158, 1227–1228 [17 Cal.Rptr.3d 532, 95 P.3d 811].
- Prolonged Pain Not Required. *People v. Cole* (2004) 33 Cal.4th 1158, 1227–1228 [17 Cal.Rptr.3d 532, 95 P.3d 811].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 446.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[18], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][v] (Matthew Bender).

RELATED ISSUES

Causation Not Required for Special Circumstance

"[T]he prosecution was not required to prove that the acts of torture inflicted upon [the victim] were the cause of his death" in order to prove

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the torture-murder special circumstance. (*People v. Crittenden* (1994) 9 Cal.4th 83, 142 [36 Cal.Rptr.2d 474, 885 P.2d 887].) Causation is required for first degree murder by torture. *(Ibid.)*

Instruction on Voluntary Intoxication

"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Pain Not an Element

As with first degree murder by torture, all that is required for the special circumstance is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. Prior to June 6, 1990, the special circumstance stated "torture requires proof of the infliction of extreme physical pain." (Pre-June 6, 1990, Pen. Code, § 190.2(a)(18).) Proposition 115 eliminated this language. Thus, for all homicides after June 6, 1990, there is no requirement under the special circumstance that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Davenport* (1985) 41 Cal.3d 247, 271 [221 Cal.Rptr. 794, 710 P.2d 861]; *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14 [36 Cal.Rptr.2d 474, 885 P.2d 887].)

Deliberate, and Premeditated Intent to Inflict Pain Not Required

"[P]remeditated and deliberate intent to torture is not an element of the torture-murder special circumstance." (*People v. Cole* (2004) 33 Cal.4th 1158, 1227 [17 Cal.Rptr.3d 532, 95 P.3d 811] [italics omitted].)

Prolonged Pain Not Required

"We have held that by enacting the torture-murder special circumstance statute (§ 190.2, subd. (a)(18)), the electorate meant to foreclose any requirement that the defendant be proved to have intended to inflict *prolonged* pain." (*People v. Cole* (2004) 33 Cal.4th 1158, 1228 [17 Cal.Rptr.3d 532, 95 P.3d 811] [italics in original, citation and internal quotation marks omitted].)

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734. Special Circumstances: Murder by Poison, Pen. Code, § 190.2(a)(19)

The defendant is charged with the special circumstance of murder by poison.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended to kill** _____ <*insert name of decedent*>**;**

AND

2. **The defendant killed** _____ <*insert name of decedent*> **by the administration of poison.**

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]

[_____ <*insert name of substance*> **is a poison.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

Give the bracketed definition of poison if there is a dispute over whether the substance is a poison. Give the bracketed paragraph stating that the substance is a poison if the parties agree that the substance is a poison.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(19).
- Special Circumstance Is Constitutional. *People v. Catlin* (2001) 26 Cal.4th 81, 159 [109 Cal.Rptr.2d 31, 26 P.3d 357].
- Poison Defined. *People v. Van Deleer* (1878) 53 Cal. 147, 149.

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, § 446.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[19], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][iii] (Matthew Bender).

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735. Special Circumstances: Discharge From Vehicle, Pen. Code, § 190.2(a)(21)

The defendant is charged with the special circumstance of committing murder by shooting a firearm from a motor vehicle.

To prove that this special circumstance is true, the People must prove that:

1. **(The defendant/**_____ <*insert name or description of principal if not defendant*>**) shot a firearm from a motor vehicle, killing** _____ <*insert name of decedent*>**;**
2. **(The defendant/**_____ <*insert name or description of principal if not defendant*>**) intentionally shot at a person who was outside the vehicle;**

AND

3. **At the time of the shooting, the defendant intended to kill.**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/ motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>**).]**

[The terms (*firearm/* [and] *motor vehicle*) (is/are) defined elsewhere in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(21).

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- Motor Vehicle Defined. Veh. Code, § 415.
- Special Circumstance Is Constitutional. *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 172 [77 Cal.Rptr.2d 676].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 447.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[21], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][vii] (Matthew Bender).

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736. Special Circumstances: Killing by Street Gang Member, Pen. Code, § 190.2(a)(22)

The defendant is charged with the special circumstance of committing murder while an active participant in a criminal street gang.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed _____ <*insert name of victim*>;**
2. **At the time of the killing, the defendant was an active participant in a criminal street gang;**
3. **The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

4. **The murder was carried out to further the activities of the criminal street gang.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

<If criminal street gang has already been defined>

[A criminal street gang is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**
2. **That has, as one or more of its primary activities, the commission of _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)*>;**

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AND

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of):

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25)>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>***;**

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25)>*

AND

[at least one of the following crimes:] _____ *<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>***;**

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions, or by two or more persons.]

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[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

[Other instructions explain what is necessary for the People to prove that a member of the gang [or the defendant] committed _____ <*insert crimes from Pen. Code, § 186.22(e)(1)–(30) inserted in definition of pattern of criminal gang activity*>**.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The effective date of this special circumstance was March 8, 2000.

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25).Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or

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more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

On request, give the bracketed paragraph that begins with "The People do not need to prove that the defendant devoted all or a substantial part of . . . ." (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal. .2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(22).
- Active Participation Defined. Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

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- Felonious Criminal Conduct Defined. *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 443.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[22], 87.14 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.03[3][a] (Matthew Bender).

RELATED ISSUES

See the Bench Notes and Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

The criminal street gang special circumstance applies when a participant in a criminal street gang intends to kill one person but kills someone else by mistake. *People v. Shabazz* (2006) 38 Cal.4th 55, 66 [40 Cal.Rptr.3d 750, 130 P.2d 519; see CALCRIM No. 562, *Transferred Intent*.

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737. Special Circumstances: Murder of Transportation Worker, Pen. Code, § 190.25

The defendant is charged with the special circumstance of murdering (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 190.25*>.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended to kill _____ <*insert name of decedent*>;**
2. **_____ <*insert name of decedent*> was (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 190.25*> performing (his/her) duties;**

AND

3. **When _____ <*insert name of decedent*> was killed, the defendant knew, or reasonably should have known, that _____ <*insert name of decedent*> was (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 190.25*> and that (he/she) was performing (his/her) duties.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].)

This special circumstance alone does not provide for the death penalty. (*People v. Marks* (2003) 31 Cal.4th 197, 234 [2 Cal.Rptr.3d 252, 72 P.3d 1222].) However, if the defendant is also convicted of a special circumstances listed in Penal Code section 190.2(a), the defendant may be eligible for the death penalty. (*Ibid.*; see also Pen. Code, § 190.25(c).)

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AUTHORITY

- Special Circumstance. Pen. Code, § 190.25.

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 459.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.14 (Matthew Bender).

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(iii) Special Circumstances With Prior Murder

750. Special Circumstances: Prior Murder Conviction, Pen. Code, § 190.2(a)(2)—Trial on Prior Murder, Pen. Code, § 190.1(a) & (b)

The defendant is charged with the special circumstance of having been convicted previously of murder. You must now decide if the People have proved that this special circumstance is true.

To prove that this special circumstance is true, the People must prove that the defendant was convicted previously of murder in the (first/second) degree.

[A conviction of _____ <*insert name of offense from other state*> is the same as a conviction for (first/second) degree murder.]

[In deciding whether the People have proved this special circumstance, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

[You may not return a finding that this special circumstance has or has not been proved unless all 12 of you agree on that finding.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court must bifurcate trial on this special circumstance from trial on the other charges unless the defendant specifically waives bifurcation. (Pen. Code, § 190.1(b); [276 Cal.Rptr. 49, 801 P.2d 292]; *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1302 [276 Cal.Rptr. 49, 801 P.2d 292].)

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The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial* and CALCRIM No. 3550, *Pre-Deliberation Instructions*.

If the defendant has waived bifurcation, the court should give paragraphs one and two. The court may also give paragraph three if appropriate. The remainder of the instruction should not be given.

"The jury sitting as trier of fact must determine 'the truth of' the prior conviction—i.e., the fact that defendant was previously convicted of first or second degree murder." (*Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301 [276 Cal.Rptr. 49, 801 P.2d 292].) The court must determine the validity of the prior conviction. (*Id.* at p. 1302.) For an out-of-state prior, the court must determine whether the elements of the offense for which the defendant was convicted satisfy the elements of first or second degree murder in California. (*People v. Martinez* (2003) 31 Cal.4th 673, 684–686 [3 Cal.Rptr.3d 648, 74 P.3d 748]; *People v. Andrews* (1989) 49 Cal.3d 200, 223 [260 Cal.Rptr. 583, 776 P.2d 285].)

Give the bracketed paragraph that begins, "In deciding whether the People have proved," on request.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(2).
- Bifurcated Trial. Pen. Code, § 190.1(a) & (b).
- Fact of Conviction Determined by Jury. *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301 [276 Cal.Rptr. 49, 801 P.2d 292].
- Validity of Conviction Determined by Court. *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1302 [276 Cal.Rptr. 49, 801 P.2d 292].
- Out-of-State Priors. *People v. Martinez* (2003) 31 Cal.4th 673, 684–686 [3 Cal.Rptr.3d 648, 74 P.3d 748]; *People v. Trevino* (2001) 26 Cal.4th 237, 242 [109 Cal.Rptr.2d 567, 27 P.3d 283]; *People v. Andrews* (1989) 49 Cal.3d 200, 223 [260 Cal.Rptr. 583, 776 P.2d 285].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 439.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.02[1], 87.12, 87.13[2] (Matthew Bender).

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RELATED ISSUES

Order of Conviction Relevant, Not Order of Murders

"The unambiguous language and purpose of section 190.2(a)(2) thus require that a person such as defendant, already convicted of murder in a prior proceeding, must be considered eligible for the death penalty if convicted of first degree murder in a subsequent trial. The order of the commission of the homicides is immaterial." (*People v. Hendricks* (1987) 43 Cal.3d 584, 596 [238 Cal.Rptr. 66, 737 P.2d 1350]; *People v. Gurule* (2002) 28 Cal.4th 557, 636 [123 Cal.Rtpr.2d 345, 51 P.3d 224].)

Intent to Kill Not Required

"Defendant also contends that section 190.2(a)(2) requires a finding of intent to kill. Plainly, the provision does not expressly require such a finding." (*People v. Hendricks* (1987) 43 Cal.3d 584, 596 [238 Cal.Rptr. 66, 737 P.2d 1350]; *People v. Gurule* (2002) 28 Cal.4th 557, 633 [123 Cal.Rtpr.2d 345, 51 P.3d 224].)

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751. Second Degree Murder With Prior Prison for Murder, Pen. Code, § 190.05

The defendant is charged with the additional allegation of having previously served a prison term for murder. You must now decide if the People have proved this allegation.

To prove that this allegation is true, the People must prove that:

1. **The defendant was convicted previously of murder in the (first/second) degree;**

AND

2. **The defendant served time in prison as a result of that conviction.**

[A conviction of _____ *<insert name of offense from other state>* **is the same as a conviction for (first/second) degree murder.]**

[For the purpose of this allegation, serving time in _____ *<insert name of institution from Pen. Code, § 190.05>* **qualifies as serving time in prison.]**

<Limiting instruction alternative A—bifurcated trial>

[In deciding whether the People have proved this allegation, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

<Limiting instruction alternative B—nonbifurcated trial>

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing credibility of the defendant>***]. Do not consider this evidence for any other purpose.]**

[You may not return a finding that this allegation has or has not been proved unless all 12 of you agree on that finding.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the additional allegation. (See Pen. Code, § 190.05(c) [must submit special allegation to jury].)

Penal Code section 190.05 provides for possible sentences of either life without parole or 15 years to life for a defendant convicted of second degree murder who has served a prior prison term for first or second degree murder. (Pen. Code, § 190.05(a).) The statute requires the jury to find the fact of the conviction true beyond a reasonable doubt. (Pen. Code, § 190.05(c), (d).) The statute does not require that trial on the prior conviction be bifurcated from trial on the underlying charge. If the court does use a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, and CALCRIM No. 3550, *Pre-Deliberation Instructions*. (See *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1579 [28 Cal.Rptr.2d 897].) The court must also give the last bracketed sentence.

On request, the court should give one of the appropriate limiting instruction, depending on whether the court has granted a bifurcated trial.

If the prior is found true, the court must then proceed with a separate penalty phase in which the jury determines which of the two possible sentences is appropriate. (Pen. Code, § 190.05(e); *People v. Gutierrez, supra,* 23 Cal.App.4th at p. 1579.) The court should then modify the death penalty phase instructions for use in this penalty phase trial. The factors for the jury to consider under Penal Code section 190.05(e) are identical to the factors to be considered in a death penalty trial. Thus, the court needs to change only the penalties that the jury must choose between.

AUTHORITY

- Second Degree Murder With Prior Prison for Murder. Pen. Code, § 190.05.
- Right to Jury Trail on Prior Conviction. Pen. Code, § 190.05(c).
- Reasonable Doubt Standard. Pen. Code, § 190.05(d).
- Separate Penalty Phase. Pen. Code, § 190.05(e).

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Against the Person, § 164.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.02[2], 87.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[4][d] (Matthew Bender).

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L. DEATH PENALTY

760. Death Penalty: Introduction to Penalty Phase

This [phase of the] trial is to determine (the/each) defendant's penalty. The law provides for two possible penalties: death or life in prison without the possibility of parole. You must decide which penalty (the/each) defendant will receive.

[You must disregard all of the instructions I gave you earlier. I will give you a set of instructions that apply only to this phase of the trial. Some of these instructions will be the same or similar to instructions you have heard before. However, you must follow only this new set of instructions in this phase of the trial.]

[The first step in this process is the opening statements.

Next, the People will offer evidence. Evidence usually includes witness testimony and exhibits. After the People's case, the defense (will/may) also present evidence.

After you have heard all the evidence and [before] the attorneys have given their final arguments, I will instruct you on the law that applies to the case.

After you have heard the arguments and instructions, you will go to the jury room to deliberate.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718 [248 Cal.Rptr. 69, 755 P.2d 253].) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt, supra,* 45 Cal.3d at p. 718, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982 [11 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [152 S.Ct. 1920, 152 L.Ed.2d 828.]) The

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Supreme Court has stated that, in order to avoid confusion, the trial court should provide the jury with a completely new set of instructions for the penalty phase. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.)

The court has a **sua sponte** duty to give the bracketed paragraph instructing the jury to disregard all previous instructions unless the current jury did not hear the guilt phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171 [51 Cal.Rptr.2d 770, 913 P.2d 980], cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251 [117 S.Ct. 2408, 138 L.Ed.2d 175].)

This instruction should be followed by any other introductory instructions the court deems appropriate prior to the presentation of penalty phase evidence. The committee recommends that the court give CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (After Jury Is Selected)*. The court may also consider giving CALCRIM No. 102, *Note-Taking*; CALCRIM No. 104, *Evidence*; and CALCRIM No. 105, *Witnesses*.

When CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (After Jury Is Selected)*, is given, the court has a **sua sponte** duty to delete the sentence which reads "Do not let bias, sympathy, prejudice, or public opinion influence your decision." (*People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed. 934].)

If the current jury did not hear the previous phases of the case, the court should give the bracketed paragraphs that begin with "The first step in this process."

AUTHORITY

- Death Penalty Statute. Pen. Code, § 190.3.
- Must Tell Jury Which Instructions Apply. *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26 [248 Cal.Rptr. 69, 755 P.2d 253].
- Should Give Jury New Set of Instructions. *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].
- Error to Instruct Not to Consider Sympathy. *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813]; *People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed. 934].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 495.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.20–87.26 (Matthew Bender).

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761. Death Penalty: Duty of Jury

I will now instruct you on the law that applies to this [phase of the] case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.]

[You must disregard all of the instructions I gave you earlier. I will give you a set of instructions that apply only to this phase of the trial. Some of these instructions will be the same or similar to instructions you have heard before. However, you must follow only this new set of instructions in this phase of the trial.]

You must decide whether (the/each) defendant will be sentenced to death or life in prison without the possibility of parole. It is up to you and you alone to decide what the penalty will be. [In reaching your decision, consider all of the evidence from the entire trial [unless I specifically instruct you not to consider something from an earlier phase].] Do not allow bias, prejudice, or public opinion to influence your opinion in any way.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything

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about the facts.] After you have decided what the facts are, follow the instructions that apply to the facts as you find them.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718 [248 Cal.Rptr. 69, 755 P.2d 253].) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26 [248 Cal.Rptr. 69, 755 P.2d 253]; *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].) The Supreme Court has stated that, in order to avoid confusion, the trial court should provide the jury with a completely new set of instructions for the penalty phase. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.)

The court has a **sua sponte** duty to give the bracketed paragraph instructing the jury to disregard all previous instructions unless the current jury did not hear the guilt phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171 [51 Cal.Rptr.2d 770, 913 P.2d 980], cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251 [117 S.Ct. 2480, 138 L.Ed.2d 175].)

The court should give the bracketed portion of the last paragraph that begins with "Do not assume just because," unless the court will be commenting on the evidence pursuant to Penal Code section 1127. The committee recommends against any comment on the evidence in the penalty phase of a capital case.

This instruction should be followed by any other general instructions on evidence or principles of law the court deems appropriate based on the facts of the case. Specifically:

- The court has a **sua sponte** duty to give CALCRIM No. 222, *Evidence* and CALCRIM No. 226, *Witnesses*. (See *People v. Miranda* (1987) 44 Cal.3d 57, 107–108 [241 Cal.Rptr. 594, 744 P.2d 1127].)
- The court has a **sua sponte** duty to give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*; Trial on Sexually Violent Predator

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Petition; and Penalty Phase of Capital Case, if the prosecution offers aggravating evidence of other criminal conduct or other felony convictions. However, the reasonable doubt standard does not apply to the question of whether the jury should impose the death penalty or to proof of other aggravating factors. (*People v. Miranda, supra,* 44 Cal.3d at p. 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].)

- If the prosecution relies on circumstantial evidence to prove other criminal conduct, the court has a **sua sponte** duty to instruct on circumstantial evidence in the penalty phase. (See *People v. Brown* (2003) 31 Cal.4th 518, 564 [3 Cal.Rptr.3d 145, 73 P.3d 1137] [no error where prosecution relied exclusively on direct evidence].)
- When requested, the court must give instructions admonishing the jury not to consider the defendant's failure to testify during the penalty phase. (*People v. Melton* (1988) 44 Cal.3d 713, 757–758 [244 Cal.Rptr. 867, 750 P.2d 741].)

AUTHORITY

- Death Penalty Statute. Pen. Code, § 190.3.
- Must Tell Jury Which Instructions Apply. *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26 [248 Cal.Rptr. 69, 755 P.2d 253].
- Should Give Jury New Set of Instructions. *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].
- Error to Instruct Not to Consider Sympathy. *People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934].
- Reasonable Doubt. *People v. Miranda* (1987) 44 Cal.3d 57, 107 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].
- Circumstantial Evidence. *People v. Brown* (2003) 31 Cal.4th 518, 564 [3 Cal.Rptr.3d 145, 73 P.3d 1137].
- Defendant's Failure to Testify. *People v. Melton* (1988) 44 Cal.3d 713, 757–758 [244 Cal.Rptr. 867, 750 P.2d 741].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 495.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.24 (Matthew Bender).

(New January 2006)

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763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating

In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.

An *aggravating circumstance or factor* is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

A *mitigating circumstance or factor* is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Under the law, you must consider, weigh, and be guided by specific factors, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

The factors are:

(a) The circumstances of the crime[s] that the defendant was convicted of in this case and any special circumstances that were found true.

(b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. *Violent criminal activity* involves the unlawful use or attempted use of force or violence or the direct or implied threat to use force or violence. [The other violent criminal activity alleged in this case will be described in these instructions.]

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(c) Any felony of which the defendant has been convicted other than the crime[s] of which the defendant was convicted in this case.

(d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] of which (he/she) was convicted in this case.

(e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct in committing the crime[s] of which (he/she) was convicted in this case.

(g) Whether at the time of the murder the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether, at the time of the offense, the defendant's capacity to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.

(i) The defendant's age at the time of the crime[s] of which (he/she) was convicted in this case.

(j) Whether the defendant was an accomplice to the murder and (his/her) participation in the murder was relatively minor.

(k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. In reaching your decision, you may consider sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.

Do not consider the absence of a mitigating factor as an aggravating factor.

[You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any

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other facts or circumstances as a basis for imposing the death penalty.]

[Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a "special circumstance" and a "circumstance of the crime."]

[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant's family influence your decision. [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Although not required, "[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record." (*People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111. S.Ct. 1023, 112 L.Ed.2d 1105]; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) The jury must be instructed to consider only those factors that are "applicable." (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with "The other violent criminal activity alleged in this case." (See *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d

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1166].) The court also has a **sua sponte** duty to give CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* in addition to this instruction.

When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes* in addition to this instruction.

On request, the court must instruct the jury not to double-count any "circumstances of the crime" that are also "special circumstances." (*People v. Melton, supra,* 44 Cal.3d at p. 768.) When requested, give the bracketed paragraph that begins with "Even if a fact is both a 'special circumstance' and also a 'circumstance of the crime'."

On request, give the bracketed sentence that begins with "You may not let sympathy for the defendant's family." (*People v. Ochoa* (1998) 19 Cal.4th 353, 456 [79 Cal.Rptr.2d 408, 966 P.2d 422].) On request, give the bracketed sentence that begins with "However, you may consider evidence about the impact the defendant's execution." *(Ibid.)*

AUTHORITY

- Death Penalty Statute. Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy. *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors. *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Must Instruct to Consider Only "Applicable Factors". *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Mitigating Factor Must Be Supported by Evidence. *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].
- Aggravating and Mitigating Defined. *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].

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- On Request Must Instruct to Consider Only Statutory Aggravating Factors. *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples. *People v. Melton* (1988) 44 Cal.3d 713, 760 [244 Cal.Rptr. 867, 750 P.2d 741]; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].
- Must Instruct to Not Double-Count. *People v. Melton* (1988) 44 Cal.3d 713, 768 [244 Cal.Rptr. 867, 750 P.2d 741].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 462, 466–467, 475, 480, 483–484, 493–497.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23, 87.24 (Matthew Bender).

COMMENTARY

Aggravating and Mitigating Factors-Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*Ibid.*; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].) In *People v. Hillhouse,* the Supreme Court stated, "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors." The committee has rephrased this for clarity and included in the text of this instruction, "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case." (People v. Hillhouse (2002) 27 Cal.4th 469, 509, fn. 6 [117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].),

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Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269 [74 Cal.Rptr.2d 212, 954 P.2d 475].) In *People v. Musselwhite, supra,* 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . ." (italics in original).

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764. Death Penalty: Evidence of Other Violent Crimes

The People allege as an aggravating circumstance that (the defendant/_____ <*insert name of defendant*>) committed _____ <*insert specific description of alleged offense[s]*>**.**

The People must prove beyond a reasonable doubt that (the defendant/_____ <*insert name of defendant*>) committed [each of] the alleged crime[s]. [Consider each of the alleged crimes separately.] If you have a reasonable doubt whether (the defendant/_____ <*insert name of defendant*>) committed (the/an) alleged crime, you must completely disregard any evidence of that crime. If the People have proved that (the defendant/_____ <*insert name of defendant*>) committed (the/an) alleged crime, you may consider the evidence of that alleged crime as an aggravating circumstance.

[To decide whether the defendant committed _____ <*insert specific description of alleged offense[s]*>**, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

Each of you must decide for yourself whether the People have proved that the defendant committed an alleged crime. You do not all need to agree whether an alleged crime has been proved. If any juror individually concludes that an alleged crime has been proved, that juror may give the evidence whatever weight he or she believes is appropriate. On the other hand, if any juror individually concludes that an alleged crime has not been proved, that juror must disregard the evidence completely.

You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [except for the alleged prior felony conviction[s] about which I will now instruct you].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that alleged prior crimes offered in aggravation must be proved beyond a reasonable doubt. (*People*

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v. Robertson (1982) 33 Cal.3d 21, 53–55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Davenport* (1985) 41 Cal.3d 247, 281 [221 Cal.Rptr. 794, 710 P.2d 861].) Evidence of prior crimes is limited to offenses involving the "use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).)

The prosecution must specify what prior crimes are alleged in aggravation and the court has a **sua sponte** duty to instruct the jury to consider only evidence relating to those alleged crimes. (*People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].)

The court has a **sua sponte** duty to give any necessary instructions on defenses to the alleged prior crimes, including instructions on voluntary intoxication as a defense. (*People v. Montiel* (1993) 5 Cal.4th 877, 942 [21 Cal.Rptr.2d 705, 855 P.2d 1277].)

When requested by the defense, the court must instruct on the elements of the alleged prior offense. (*People v. Brown* (2003) 31 Cal.4th 518, 571 [3 Cal.Rptr.3d 145, 73 P.3d 1137]; (*People v. Cox* (2003) 30 Cal.4th 916, 964 [135 Cal.Rptr.2d 272, 70 P.3d 277]; *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [106 Cal.Rptr.2d 575, 22 P.3d 347] [rule not changed by *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]], cert. den. sub nom. *Anderson v. California* (2002) 534 U.S. 1136 [122 S.Ct. 1082, 151 L.Ed.2d 982].) However, the court is not required to instruct on the elements sua sponte. (*People v. Brown, supra,* 31 Cal.4th at p. 571; *People v. Cox, supra,* 30 Cal.4th at p. 964.) The defense may, for tactical reasons, prefer not to have the jury hear the elements.

Give the bracketed portion in the final paragraph when the court is also instructing the jury on prior felony convictions alleged in aggravation. (See CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes*.)

If the case involves only one defendant, the court should use the word "defendant" throughout the instruction. If the case involves codefendants tried jointly, the court should insert the name of the specific defendant alleged to have committed the prior crimes in the places indicated in the instruction.

AUTHORITY

- Factor (b). Pen. Code, § 190.3.

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- Must Instruct on Reasonable Doubt. *People v. Robertson* (1982) 33 Cal.3d 21, 53–55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Davenport* (1985) 41 Cal.3d 247, 281 [221 Cal.Rptr. 794, 710 P.2d 861].
- Must Instruct Jury to Consider Only Specified Prior Crimes Evidence. *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].
- Instruct on Elements Only When Requested. *People v. Brown* (2003) 31 Cal.4th 518, 571 [3 Cal.Rptr.3d 145, 73 P.3d 1137]; *People v. Cox* (2003) 30 Cal.4th 916, 964 [135 Cal.Rptr.2d 272, 70 P.3d 277]; *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [106 Cal.Rptr.2d 575, 22 P.3d 347], cert. den. sub nom. *Anderson v. California* (2002) 534 U.S. 1136 [122 S.Ct. 1082, 151 L.Ed.2d 982].
- Defense Instructions to Uncharged Crimes. *People v. Montiel* (1993) 5 Cal.4th 877, 942 [21 Cal.Rptr.2d 705, 855 P.2d 1277].
- Constitutional to Admit Evidence of Uncharged Crimes. *People v. Balderas* (1985) 41 Cal.3d 144, 205 [222 Cal.Rptr. 184, 711 P.2d 480]; *People v. Brown* (2003) 31 Cal.4th 518, 571 [2 Cal.Rptr.3d 145, 73 P.3d 1137].
- No Unanimity Requirement. *People v. Benson* (1990) 52 Cal.3d 754, 811 [276 Cal.Rptr. 827, 802 P.2d 330].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 473.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23, 87.24 (Matthew Bender).

RELATED ISSUES

Need Not Instruct on Presumption of Innocence

The court is not required to instruct on the presumption of innocence regarding alleged prior crimes. (*People v. Benson* (1990) 52 Cal.3d 754, 809–810 [276 Cal.Rptr. 827, 802 P.2d 330].)

No Unanimity Requirement

"We see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proved beyond a reasonable

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doubt and, if so, what weight that activity should be given in deciding the penalty." (*People v. Benson* (1990) 52 Cal.3d 754, 811 [276 Cal.Rptr. 827, 802 P.2d 330].)

No Requirement to Instruct Jury Must Find "Violence or Threat of Violence" Beyond a Reasonable Doubt

The court is required to instruct the jury that the alleged prior crime must be proved beyond a reasonable doubt. However, the court does not have to instruct the jury that the fact that the alleged crime involved violence or the threat of violence must be proved beyond a reasonable doubt. (*People v. Ochoa* (2002) 26 Cal.4th 398, 453 [110 Cal.Rptr.2d 324, 28 P.3d 78], cert. den. sub nom. *Ochoa v. California* (1999) 528 U.S. 862 [112 S.Ct. 1803, 152 L.Ed 2d 660].)

May Use Same Conduct Under Factor (b) and Factor (c)

"Where violent 'criminal activity' results in a 'prior felony conviction,' it shows both a propensity for violence and an inability or unwillingness to be deterred by prior criminal sanctions. The jury was entitled to consider the relevance of defendant's prior conviction for both purposes under factors (b) *and* (c)." (People v. Whitt (1990) 51 Cal.3d 620, 654 [274 Cal.Rptr. 252, 798 P.2d 849] [emphasis in original]; *People v. Yeoman* (2003) 31 Cal.4th 93, 156 [2 Cal.Rptr.3d 186, 72 P.3d 1166].)

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765. Death Penalty: Conviction for Other Felony Crimes

The People allege as an aggravating circumstance that (the defendant/_____ <*insert name of defendant*>) was convicted of _____ <*insert name of felony conviction*> on _____ <*insert date of conviction*>. <*Repeat for each felony conviction alleged.*>

The People must prove (this/these) allegation[s] beyond a reasonable doubt. If you have a reasonable doubt whether (the defendant/_____ <*insert name of defendant*>) was convicted of (the/an) alleged crime, you must completely disregard any evidence of that crime. If the People have proved that (the defendant/_____ <*insert name of defendant*>) was convicted of (the/an) alleged prior crime, you may consider the fact of that prior conviction as an aggravating circumstance.

You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [except for the alleged criminal activity I discussed in the previous instruction].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that alleged prior felony convictions offered in aggravation must be proved beyond a reasonable doubt. (See *People v. Robertson* (1982) 33 Cal.3d 21, 53–55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Davenport* (1985) 41 Cal.3d 247, 281 [221 Cal.Rptr. 794, 710 P.2d 861].)

The prosecution must specify what convictions are alleged in aggravation, and the court has a **sua sponte** duty to instruct the jury to consider only evidence relating to those prior convictions. (See *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].)

To be admissible under factor (c), the defendant must have been convicted of the other felony offense prior to the commission of the offenses charged in the current case. (*People v. Balderas* (1985) 41 Cal.3d 144, 205 [222 Cal.Rptr. 184, 711 P.2d 480]; *People v. Kaurish* (1990) 52 Cal.3d 648, 702. [276 Cal.Rptr. 788, 802 P.2d 278].)

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Give the bracketed portion in the final paragraph when the court is also instructing the jury on prior violent crimes alleged in aggravation. (See CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes*.)

In *People v. Benson* (1990) 52 Cal.3d 754, 811 [276 Cal.Rptr. 827, 802 P.2d 330], the Supreme Court held that the jury need not be unanimous about whether prior violent crimes offered under factor (b) have been proved beyond a reasonable doubt. The Supreme Court has not ruled on whether this also applies to prior felony convictions offered under factor (c). If the court determines that the jury need not be unanimous about whether prior felony convictions have been proved beyond a reasonable doubt, the court may, on request, add the following paragraph:

> Each of you must decide for yourself whether the People have proved that the defendant was convicted of an alleged crime. You do not all need to agree whether an alleged conviction has been proved. If any juror individually concludes that an alleged conviction has been proved, that juror may give the evidence whatever weight he or she believes is appropriate. On the other hand, if any juror individually concludes that an alleged conviction has not been proved, that juror must disregard the evidence completely.

If the case involves only one defendant, the court should use the word "defendant" throughout the instruction. If the case involves codefendants tried jointly, the court should insert the name of the specific defendant alleged to have been convicted of the prior felony in the places indicated in the instruction.

AUTHORITY

- Factor (c). Pen. Code, § 190.3.
- Must Be Proved Beyond a Reasonable Doubt. *People v. Robertson* (1982) 33 Cal.3d 21, 53–55 [188 Cal.Rptr. 77,655 P.2d 274]; *People v. Davenport* (1985) 41 Cal.3d 247, 281 [221 Cal.Rptr. 794, 710 P.2d 861].
- Must Pre-Date Current Offense. *People v. Balderas* (1985) 41 Cal.3d 144, 205 [222 Cal.Rptr. 184, 711 P.2d 480]; *People v. Kaurish* (1990) 52 Cal.3d 648, 702 [276 Cal.Rptr. 788, 802 P.2d 278].
- Defendant May Raise Constitutional Challenge to Prior. *People v. La Fargue* (1983) 147 Cal.App.3d 878, 890 [195 Cal.Rptr. 438].
- Out-of-State Convictions. *People v. Lang* (1989) 49 Cal.3d 991, 1038–1039 [264 Cal.Rptr. 386, 782 P.2d 627].

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- Constitutional to Admit Evidence of Prior Convictions. *People v. Kaurish* (1990) 52 Cal.3d 648, 701 [276 Cal.Rptr. 788, 802 P.2d 278].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 474.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23, 87.24 (Matthew Bender).

RELATED ISSUES

Out-of-State Felony Convictions

"In the absence of limitation, a reference to 'prior felony convictions' is deemed to include any prior conviction which was a felony under the laws of the convicting jurisdiction." (*People v. Lang* (1989) 49 Cal.3d 991, 1038–1039 [264 Cal.Rptr. 386, 782 P.2d 627].) Thus, the out-of-state prior does not have to qualify as a felony under California law. *(Ibid.)*

Constitutional Challenge

The defendant may bring a constitutional challenge to the validity of the prior conviction. (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 890 [195 Cal.Rptr. 438].) If the conviction is from another country, the defendant may challenge the prior on the basis that the foreign jurisdiction does not provide the procedural safeguards mandated by the United States Constitution. *(Ibid.)*

Evidence of Charges and Underlying Facts Not Admissible, Only Conviction

"Because the . . . burglaries were nonviolent crimes, only evidence authenticating defendant's *conviction* for these crimes was relevant and admissible under section 190.3, factor (c). Unlike violent criminal activity admissible under factor (b), the *charges* leading to a conviction of a nonviolent crime are inadmissible." (*People v. Kaurish* (1990) 52 Cal.3d 648, 703 [276 Cal.Rptr. 788, 802 P.2d 278] [emphasis in original]; *People v. Stanley* (1995) 10 Cal.4th 764, 819 [42 Cal.Rptr.2d 543, 897 P.2d 481] [facts admissible under factor (b) but not under factor (c)].)

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766. Death Penalty: Weighing Process

You have sole responsibility to decide which penalty (the/each) defendant will receive.

You must consider the arguments of counsel and all the evidence presented [during (both/all) phases of the trial] [except for the items of evidence I specifically instructed you not to consider].

In reaching your decision, you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.

Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.

Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

[In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out.]

To return a verdict of either death or life without the possibility of parole, all 12 of you must agree on that verdict.

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[You must separately consider which sentence to impose on each defendant. If you cannot agree on the sentence[s] for one [or more] defendant[s] but you do agree on the sentence[s] for the other defendant[s], then you must return a verdict for (the/each) defendant on whose sentence you do agree.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the weighing process in a capital case. (*People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Following this instruction, the court **must give** CALCRIM No. 3550, *Pre-Deliberation Instructions*, explaining how to proceed in deliberations.

On request, give the bracketed sentence that begins with "In making your decision about penalty." (*People v. Kipp* (1988) 18 Cal.4th 349, 378–379 [75 Cal.Rptr.2d 716, 956 P.2d 1169].)

AUTHORITY

- Death Penalty Statute. Pen. Code, § 190.3.
- Error to Instruct "Shall Impose Death". *People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516].
- Must Instruct on Weighing Process. *People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Duncan* (1991) 53 Cal.3d 955, 977–979 [281 Cal.Rptr. 273, 810 P.2d 131].
- Aggravating Factors "So Substantial in Comparison to" Mitigating. *People v. Duncan* (1991) 53 Cal.3d 955, 977–979 [281 Cal.Rptr. 273, 810 P.2d 131].
- Error to Instruct on Commutation. *People v. Ramos* (1982) 37 Cal.3d 136, 159 [207 Cal.Rptr. 800, 689 P.2d 430].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 466–467, 493–494, 496–497.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23[2], 87.24[1] (Matthew Bender).

RELATED ISSUES

No Presumption of Life and No Reasonable Doubt Standard

The court is not required to instruct the jury that there is a presumption in favor of a life sentence; that the aggravating factors (other than prior crimes) must be found beyond a reasonable doubt; or that the jury must find beyond a reasonable doubt that the aggravating factors substantially outweigh the mitigating factors. (*People v. Benson* (1990) 52 Cal.3d 754, 800 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Miranda* (1987) 44 Cal.3d 57, 107 [241 Cal.Rptr. 827, 802 P.2d 330]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].)

Unanimity on Factors Not Required

The court is not required to instruct the jury that they must unanimously agree on any aggravating circumstance. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rtpr. 667, 726 P.2d 113].)

Commutation Power

It is error for the court to instruct on the Governor's commutation power unless specifically requested by the defense. (*People v. Ramos* (1982) 37 Cal.3d 136, 159 [207 Cal.Rptr. 800, 689 P.2d 430].) If the jury inquires about commutation, the court may inform the jury that the Governor has the power to commute either sentence, but the jury may not consider this in reaching its decision. (*Id*. at 159, fn. 12; see 3 Witkin & Epstein, Califronia Criminal Law (3d ed. 2000) Punishment, § 496 [collecting cases in which court required to respond to inquiries from jury regarding commutation].) The court must not state or imply to the jury that the ultimate authority for selecting the sentence to be imposed lies elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329 [105 S.Ct. 2633, 86 L.Ed.2d 1231].)

Deadlock—No Duty to Inform Jury Not Required to Return Verdict

"[W]here, as here, there is no jury deadlock, a court is not required to instruct the jury that it has the choice not to deliver any verdict." (*People v. Miranda* (1987) 44 Cal.3d 57, 105 [241 Cal.Rptr. 594, 744 P.2d 1127].)

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Deadlock—Questions From the Jury About What Will Happen

If the jury inquires about what will happen in the event of a deadlock, the court should refuse to answer. (*People v. Bell* (1989) 49 Cal.3d 502, 553 [262 Cal.Rptr. 1, 778 P.2d 129].)

No Duty to Instruct Not to Consider Deterrence or Costs

"Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Benson* (1990) 52 Cal.3d 754, 807 [276 Cal.Rptr. 827, 802 P.2d 330] [citation and internal quotation marks omitted].) Where "[t]he issue of deterrence or cost [is] not raised at trial, either expressly or by implication," the court need not instruct the jury to disregard these matters. *(Ibid.)*

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775. Death Penalty: Mental Retardation

I will now instruct you on the law that applies to this [phase of the] case.

[You must disregard all the instructions I gave you earlier and decide this phase of the trial applying only the instructions that I am giving you now. Some of these instructions will be the same or similar to instructions you have heard before. However, you must follow only this new set of instructions in this phase of the trial.]

You must decide whether the defendant is mentally retarded.

In order to establish that (he/she) is mentally retarded, the defendant must prove by a preponderance of the evidence that:

1. **(His/Her) general intellectual functioning is significantly below average;**
2. **(He/She) also has deficits in two or more areas of adaptive behavior;**

AND

3. **These conditions were observable before the defendant reached the age of 18 years.**

Adaptive behavior **is the set of learned skills that people generally need to function in their everyday lives. Those skill areas include communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.**

Proof by a preponderance of the evidence **is a different standard than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that (he/she) is mentally retarded. If the defendant has not met this burden, you must find that (he/she) has not proved that (he/she) is mentally retarded. In order to return a finding that the defendant is or is not mentally retarded, you must all agree on that finding.**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718 [248 Cal.Rptr. 69, 755 P.2d 253].) In the context of penalty phase instructions, the Supreme Court has stated that the trial court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt, supra,* 45 Cal.3d at p. 718, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].) In order to avoid confusion, the Supreme Court has indicated that the preferable practice is for the court to provide the jury with a completely new set of instructions. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.) The committee recommends this approach in the mental retardation phase as well.

When the defendant in a capital trial raises the issue of mental retardation, the jury must decide the question unless the defendant has waived a jury on the issue. (Pen. Code, § 1376(b)(1).) The hearing on mental retardation shall be conducted after the guilt phase and prior to the penalty phase. *(Ibid.)* If the defendant has entered a plea of not guilty by insanity, the hearing on mental retardation shall be conducted after the sanity phase. (Pen. Code, § 1376(e).) The defense bears the burden of proving mental retardation by a preponderance of the evidence. (Pen. Code, § 1376(b)(2).)

The court **must** also give any necessary instructions on witnesses and evidence, such as CALCRIM No. 222, *Evidence*; CALCRIM No. 226, *Witnesses*; and CALCRIM No. 332, *Expert Witness*. The court must conclude with CALCRIM No. 3550, *Pre-Deliberation Instructions*.

AUTHORITY

- Hearing on Mental Retardation in Death Penalty Case. Pen. Code, § 1376.
- Execution of Mentally Retarded Unconstitutional. *Atkins v. Virginia* (2002) 536 U.S. 304, 319–321 [122 S.Ct. 2242, 153 L.Ed.2d 335].
- Mental Retardation Defined. Pen. Code, § 1376(a); *In re Hawthorne* (2005) 35 Cal.4th 40, 47–49 [24 Cal.Rptr.3d 189, 105 P.3d 552]; American Association on Mental Retardation, http://www.aamr.org/Policies/faq_mental_retardation.shtml (accessed August 16, 2006 [case sensitive]).

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- Should Give Jury New Set of Instructions (Penalty Phase). *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.16, 87.17, 87.18 (Matthew Bender).

RELATED ISSUES

Scope of Expert Testing

When the defendant places at issue the question of whether he or she is mentally retarded, the defendant must submit to examination by a prosecution expert. (*Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 40 [11 Cal.Rptr.3d 533].) "However, those examinations are permissible only to the extent they are reasonably related to the determination of the existence of the mental condition raised. . . . [On] a defense objection to specific proposed prosecution tests, the trial court must make a threshold determination that the tests bear some reasonable relation to measuring mental retardation, including factors that might confound or explain the testing, such as malingering. . . . The trial court must prohibit any tests it concludes are not reasonably related to determining mental retardation." (*Id.* at p. 45.)

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ASSAULTIVE AND BATTERY CRIMES

A. MAYHEM

800. Aggravated Mayhem

801. Mayhem

802–809. Reserved for Future Use

B. TORTURE

810. Torture

811–819. Reserved for Future Use

C. ABUSE OF OR INJURY TO CHILD, ELDER OR DEPENDENT ADULT, SPOUSE

(i) Child

820. Assault Causing Death of Child

821. Child Abuse Likely to Produce Great Bodily Harm or Death

822. Inflicting Physical Punishment on Child

823. Child Abuse

824–829. Reserved for Future Use

(ii) Elder or Dependent Adult

830. Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death

831. Abuse of Elder or Dependent Adult

832–839. Reserved for Future Use

(iii) Spouse, etc.

840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition

841. Simple Battery: Against Spouse, Cohabitant, or Fellow Parent

842–849. Reserved for Future Use

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(iv) Evidence

850. Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness

851. Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense

852. Evidence of Uncharged Domestic Violence

853. Evidence of Uncharged Abuse of Elder or Dependent Person

854–859. Reserved for Future Use

D. ASSAULT

(i) With Weapon or Force Likely

(A) On Specified People

860. Assault on Firefighter or Peace Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury

861. Assault on Firefighter or Peace Officer With Stun Gun or Taser®

862. Assault on Custodial Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury

863. Assault on Transportation Personnel or Passenger With Deadly Weapon or Force Likely to Produce Great Bodily Injury

864–874. Reserved for Future Use

(B) General

875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury

876. Assault With Stun Gun or Taser®

877. Assault With Caustic Chemicals

878–889. Reserved for Future Use

(ii) With Intent to Commit Other Offense

890. Assault With Intent to Commit Sex Offense

891. Assault With Intent to Commit Mayhem

892–899. Reserved for Future Use

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(iii) Simple Assault on Specified People or in Specified Location

900. Assault on Firefighter or Peace Officer
901. Assault on Custodial Officer
902. Assault on Military Personnel
903. Assault on School District Peace Officer
904. Assault on School Employee
905. Assault on Juror
906. Assault Committed on School or Park Property
907. Assault Committed on Public Transportation Provider's Property or Vehicle
908–914. Reserved for Future Use

(iv) Simple Assault

915. Simple Assault
916. Assault by Conditional Threat
917. Insulting Words Are Not a Defense
918–924. Reserved for Future Use

E. BATTERY

(i) Causing Injury

925. Battery Causing Serious Bodily Injury
926. Battery Causing Injury to Specified Victim Not a Peace Officer
927–934. Reserved for Future Use

(ii) Sexual Battery

935. Sexual Battery: Felony
936. Sexual Battery on Institutionalized Victim
937. Sexual Battery: By Fraudulent Representation
938. Sexual Battery: Misdemeanor
939–944. Reserved for Future Use

(iii) On Specified Person or in Specified Location

945. Simple Battery Against Peace Officer

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946. Battery Against Custodial Officer
947. Simple Battery on Military Personnel
948. Battery Against Transportation Personnel or Passenger
949. Battery Against School Employee
950. Battery Against a Juror
951. Battery Committed on School, Park, or Hospital Property
952–959. Reserved for Future Use

(iv) Simple Battery

960. Simple Battery
961–964. Reserved for Future Use

F. SHOOTING AND BRANDISHING

(i) Shooting

965. Shooting at Inhabited House or Occupied Motor Vehicle
966. Shooting at Uninhabited House or Unoccupied Motor Vehicle
967. Shooting at Unoccupied Aircraft
968. Shooting From Motor Vehicle
969. Permitting Someone to Shoot From Vehicle
970. Shooting Firearm in Grossly Negligent Manner
971–979. Reserved for Future Use

(ii) Brandishing

980. Brandishing Firearm in Presence of Occupant of Motor Vehicle
981. Brandishing Firearm in Presence of Peace Officer
982. Brandishing Firearm or Deadly Weapon to Resist Arrest
983. Brandishing Firearm or Deadly Weapon: Misdemeanor
984. Brandishing Firearm: Misdemeanor—Public Place
985. Brandishing Imitation Firearm
986–999. Reserved for Future Use

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A. MAYHEM

800. Aggravated Mayhem

The defendant is charged [in Count ____] with aggravated mayhem.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant unlawfully and maliciously (disabled or disfigured someone permanently/ [or] deprived someone else of a limb, organ, or part of (his/her) body);**
2. **When the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or part of (his/her) body);**

AND

3. **Under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person.**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

[The People do not have to prove that the defendant intended to kill.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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In element 1, give the first option if the defendant was prosecuted for permanently disabling or disfiguring the victim. Give the second option if the defendant was prosecuted for depriving someone of a limb, organ, or body part. (See Pen. Code, § 205.)

The bracketed sentence regarding "permanent injury" may be given on request if there is evidence that the injury may be repaired by medical procedures. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [23 Cal.Rptr.2d 783] [not error to instruct that an injury may be permanent even though cosmetic repair may be medically feasible].)

The bracketed sentence stating that "The People do not have to prove that the defendant intended to kill," may be given on request if there is no evidence or conflicting evidence that the defendant intended to kill someone. (See Pen. Code, § 205.)

AUTHORITY

- Elements. Pen. Code, § 205.
- Malicious Defined. Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Permanent Disability. See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months], overruled on other grounds *People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803].
- Permanent Disfigurement. See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Specific Intent to Cause Maiming Injury. *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833 [267 Cal.Rptr. 283]; *People v. Lee* (1990) 220 Cal.App.3d 320, 324–325 [269 Cal.Rptr. 434].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 87.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.16 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempted Aggravated Mayhem. Pen. Code, §§ 205, 663.
- Assault. Pen. Code, § 240.
- Battery with Serious Bodily Injury. Pen. Code, § 243(d); *People v. Ausbie* (2004) 123 Cal.App.4th 855 [20 Cal.Rptr.3d 371].
- Battery. Pen. Code, § 242.

Assault with force likely to produce great bodily injury (Pen. Code, § 245(a)(1)) is not a lesser included offense to mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862–863 [20 Cal.Rptr.3d 371].)

RELATED ISSUES

Victim Must Be Alive

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058 [99 Cal.Rptr.2d 1, 5 P.3d 68]; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629 [138 Cal.Rptr. 250].)

Evidence of Indiscriminate Attack or Actual Injury Constituting Mayhem Insufficient to Show Specific Intent

"Aggravated mayhem . . . requires the specific intent to cause the maiming injury. [Citation.] Evidence that shows no more than an 'indiscriminate attack' is insufficient to prove the required specific intent. [Citation.] Furthermore, specific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately. [Citation.]" (*People v. Park* (2000) 112 Cal.App.4th 61, 64 [4 Cal.Rptr.3d 815].)

(New January 2006)

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801. Mayhem

The defendant is charged [in Count ____] with mayhem.

To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when (he/she) unlawfully and maliciously:

[1. Removed a part of someone's body(;/.)]

[OR]

[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

[OR]

[3. Permanently disfigured someone(;/.)]

[OR]

[4. Cut or disabled someone's tongue(;/.)]

[OR]

[5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)]

[OR]

[6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[_____<*Insert description of injury when appropriate; see Bench Notes*>**is a serious bodily injury.]**

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

AUTHORITY

- Elements. Pen. Code, § 203.
- Malicious Defined. Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Serious Bodily Injury Defined. *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559–1560 [273 Cal.Rptr. 389].
- Disabled. See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months], overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803].
- General Intent Crime. *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1226 [113 Cal.Rptr.2d 1]; *People v. Sekona* (1994) 27 Cal.App.4th 443, 453 [32 Cal.Rptr.2d 606].
- Permanent Disfigurement. *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; *Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Put Out Eye. *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1138 [215 Cal.Rptr. 750]; *People v. Green* (1976) 59 Cal.App.3d 1, 3–4 [130 Cal.Rptr. 318] [addressing corrective lenses]; *People v. Nunes* (1920) 47 Cal.App. 346, 350 [190 P. 486].

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- Slit Lip. *People v. Caldwell* (1984) 153 Cal.App.3d 947, 952 [200 Cal.Rptr. 508] [defendant bit through victim's lower lip].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 84–86.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.16 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Mayhem. Pen. Code, §§ 203, 663.
- Assault. Pen. Code, § 240; see *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [159 Cal.Rptr. 111] [mayhem occurred during continuing assault].
- Battery with Serious Bodily Injury. Pen. Code, § 243(d); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 859 [20 Cal.Rptr.3d 371].
- Battery. Pen. Code, § 242.

Assault with force likely to produce great bodily injury (Pen. Code, § 245(a)(1)) is not a lesser included offense to mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862–863 [20 Cal.Rptr.3d 371].)

RELATED ISSUES

Disfigurement

Disfigurement constitutes mayhem "only when the injury is permanent." (*People v. Goodman* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783].) However, the "possibility that a victim's disfigurement might be alleviated through reconstructive surgery is no bar to a finding of 'permanent' injury." (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774 [54 Cal.Rptr.2d 521].) "We . . . reject [the] contention that evidence of medical alleviation may be used in a mayhem trial to prove an injury, permanent by its nature, may be corrected by medical procedures." (*People v. Hill*, *supra*, 23 Cal.App.4th at 1574.) In addition, "[t]he fact that [disfiguring injuries] are on a normally unexposed portion of [a] body does not render them any less significant." (*People v. Keenan* (1991) 227 Cal.App.3d 26, 36 [277 Cal.Rptr. 687] [burns inflicted on victim's breasts by a cigarette].)

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Imperfect Self-Defense Not Available

"[A]part from the *McKelvy* lead opinion, there is no authority to support [the] claim that the mere use of the term 'malicious' in section 203 requires a court to instruct a jury that an actual but unreasonable belief will negate the malice required to convict for mayhem . . . . [Mayhem] involves a different requisite mental state and has no statutory history recognizing a malice aforethought element or the availability of the *Flannel* defense." (*People v. Sekona* (1994) 27 Cal.App.4th 443, 457 [32 Cal.Rptr.2d 606]; contra, *People v. McKelvy* (1987) 194 Cal.App.3d 694, 702–704 [239 Cal.Rptr. 782] (lead opn. of Kline, P.J.).)

Victim Must Be Alive

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058 [99 Cal.Rptr.2d 1, 5 P.3d 68]; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629 [138 Cal.Rptr. 250].)

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B. TORTURE

810. Torture

The defendant is charged [in Count ____] with torture.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant inflicted great bodily injury on someone else;**

AND

2. **When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[It is not required that a victim actually suffer pain.]

[Someone acts for the purpose of *extortion* if he or she intends to (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone acts for the purpose of *extortion* if he or she (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act. An *official act* is an act that an officer does in his or her official capacity using the authority of his or her public office.]

[Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Unlike murder by torture, the crime of torture does not require that the intent to cause pain be premeditated or that any cruel or extreme pain be prolonged. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1205 [68 Cal.Rptr.2d 619]; *People v. Vital* (1996) 45 Cal.App.4th 441, 444 [52 Cal.Rptr.2d 676].) Torture as defined in section 206 of the Penal Code focuses on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904].) Give the first bracketed paragraph on request if there is no proof that the alleged victim actually suffered pain. (See Pen. Code, § 206.)

"Extortion" need not be defined for purposes of torture. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564 [18 Cal.Rptr.2d 395]; but see *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628] [term should be defined for kidnapping under Pen. Code, § 209].) Nevertheless, either of the bracketed definitions of extortion, and the related definition of "official act," may be given on request if any of these issues are raised in the case. (See Pen. Code, § 518 [defining "extortion"]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition of the term].) It appears that this type of extortion would rarely occur in the context of torture, so it is excluded from this instruction.

"Sadistic purpose" may be defined on request. (See *People v. Barrera, supra,* 14 Cal.App.4th at p. 1564; *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712] [approving use of phrase in torture-murder and special circumstances torture-murder instructions].)

Related Instructions

First degree murder by torture defines torture differently for the purposes of murder. See CALCRIM No. 521, *Murder: Degrees*.

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AUTHORITY

- Elements. Pen. Code, § 206.
- Extortion Defined. Pen. Code, § 518.
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); see, e.g., *People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904] [broken and smashed teeth, split lip, and facial cut sufficient evidence of great bodily injury].
- Cruel Pain Equivalent to Extreme or Severe Pain. *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202 [68 Cal.Rptr.2d 619].
- Intent. *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Hale* (1999) 75 Cal.App.4th 94, 106–107 [88 Cal.Rptr.2d 904]; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042–1043 [84 Cal.Rptr.2d 5]; see *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1206 [68 Cal.Rptr.2d 619] [neither premeditation nor intent to inflict prolonged pain are elements of torture].
- Sadistic Purpose Defined. *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202–1204 [68 Cal.Rptr.2d 619]; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 [18 Cal.Rptr.2d 274] [sexual element not required].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 88–90.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.15 (Matthew Bender).

LESSER INCLUDED OFFENSES

In *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1042–1046 [23 Cal.Rptr.3d 508], the court held that none of the following offenses were lesser included offenses to torture: assault with a deadly weapon (Pen. Code, § 245(a)(1); corporal injury on a cohabitant (Pen. Code, § 273.5); forcible rape (Pen. Code, § 261(a)(2)); forcible oral copulation (Pen. Code, § 288a(c)); criminal threats (Pen. Code, § 422); dissuading a witness by force or threats (Pen. Code, § 136.1(c)(1)); false imprisonment by violence. (Pen. Code, § 236.)

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The court did not decide whether assault with force likely to cause great bodily injury is a lesser included offense to torture. (*Id.* at p. 1043–1044.)

(New January 2006)

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C. ABUSE OF OR INJURY TO CHILD, ELDER OR DEPENDENT ADULT, SPOUSE

(i) Child

820. Assault Causing Death of Child

The defendant is charged [in Count ____] with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had care or custody of a child who was under the age of 8;**
2. **The defendant did an act that by its nature would directly and probably result in the application of force to the child;**
3. **The defendant did that act willfully;**
4. **The force used was likely to produce great bodily injury;**
5. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in great bodily injury to the child;**
6. **When the defendant acted, (he/she) had the present ability to apply force likely to produce great bodily injury to the child;**

[AND]

7. **The defendant's act caused the child's death(;/.)**

<Give element 8 when instructing on parental right to discipline>

[AND

8. **When the defendant acted, (he/she) was not reasonably disciplining a child.]**

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Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

An act *causes death* if:

1. **The death was the natural and probable consequence of the act;**
2. **The act was a direct and substantial factor in causing the death;**

AND

3. **The death would not have happened without the act.**

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].) Give bracketed element 8 and CALCRIM No. 3405, *Parental Right to Punish a Child.*

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Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements. Pen. Code, § 273ab; see *People v. Malfavon* (2002) 102 Cal.App.4th 727, 735 [125 Cal.Rptr.2d 618] [sometimes called "child abuse homicide"].
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Albritton* (1998) 67 Cal.App.4th 647, 658 [79 Cal.Rptr.2d 169].
- Willful Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Force Likely to Produce Great Bodily Injury. *People v. Preller* (1997) 54 Cal.App.4th 93, 97–98 [62 Cal.Rptr.2d 507] [need not prove that reasonable person would believe force would be likely to result in child's death].
- General Intent Crime. *People v. Albritton* (1998) 67 Cal.App.4th 647, 658–659 [79 Cal.Rptr.2d 169].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 99.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[2A], 142.23[7] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Assault on Child With Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 664, 273ab.
- Assault. Pen. Code, § 240.

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- Assault With Force Likely to Produce Great Bodily Injury. Pen. Code, § 245(a)(1); *People v. Bausta* (2001) 94 Cal.App.4th 370, 392 [114 Cal.Rptr.2d 285].

Involuntary manslaughter is not a lesser included offense of Penal Code section 273ab. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 796 [91 Cal.Rptr.2d 888]; *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 261–262 [86 Cal.Rptr.2d 384].)

Neither murder nor child abuse homicide is a necessarily included offense within the other. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 743–744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Care or Custody

"The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257].)

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821. Child Abuse Likely to Produce Great Bodily Harm or Death

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The defendant is charged [in Count ____] with child abuse likely to produce (great bodily harm/ [or] death).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on a child;]

<Alternative B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering;]

<Alternative C—while having custody, caused or permitted to suffer injury>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child's person or health to be injured;]

<Alternative D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health might have been endangered;]

[AND]

2. The defendant (inflicted pain or suffering on the child/ [or] caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce (great bodily harm/ [or] death)(;/.)

<Give element 3 when giving alternatives 1B, 1C or 1D>

[AND]

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[3. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)(;/.)]

<Give element 4 when instructing on parental right to discipline>

[AND

4. The defendant did not act while reasonably disciplining a child.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *child* is any person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily harm;

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[A child does not need to actually suffer great bodily harm. But if a child does suffer great bodily harm, you may consider that

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fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 CR2d 33].) Give bracketed element 4 and CALCRIM No. 3405, *Parental Right to Punish a Child.*

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(a).)

Give bracketed element 3 and the bracketed definition of "criminally negligent" if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780].)

Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity or degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

Give on request the bracketed paragraph stating that a child need not actually suffer great bodily harm. (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

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AUTHORITY

- Elements. Pen. Code, § 273a(a); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- Child Defined. See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- Great Bodily Harm or Injury Defined. Pen. Code, § 12022.7(f); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519].
- Willful Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct. *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr. 1, 763 P.2d 852].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering. *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–163.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][a][v], 142.23[7] (Matthew Bender).

COMMENTARY

Any violation of Penal Code section 273a(a) must be willful. (*People v. Smith* (1984) 35 Cal.3d 798, 806 [678 P.2d 886]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511] [the prong punishing a *direct infliction* of unjustifiable physical pain or mental

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suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes,* the committee has included "willfully" in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

LESSER INCLUDED OFFENSES

- Attempted Child Abuse. Pen. Code, §§ 664, 273a(a).
- Misdemeanor Child Abuse. Pen. Code, § 273a(b).

RELATED ISSUES

Care or Custody

"The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [90 Cal.Rptr.2d 578] [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257]].)

Prenatal Conduct

Penal Code section 273a does not apply to prenatal conduct endangering an unborn child. (*Reyes v. Superior Court* (1977) 75 Cal.App.3d 214, 217–218, 219 [141 Cal.Rptr. 912].)

Unanimity

The court has a sua sponte duty to instruct on unanimity when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].) However, the court does not have to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777].) Child abuse may be a continuous course of conduct or a single, isolated incident. *(Ibid.)* The court should carefully examine the statute charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. *(Ibid.)* See generally CALCRIM No. 3500, *Unanimity*.

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822. Inflicting Physical Punishment on Child

The defendant is charged [in Count ____] with inflicting on a child cruel or inhuman physical punishment or injury that caused a traumatic condition.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully inflicted (cruel or inhuman physical punishment/ [and/or] an injury) on a child;**

[AND]

2. **The (punishment/ [and/or] injury) inflicted by the defendant caused a traumatic physical condition to the child(;/.)**

<Give element 3 when instructing on parental right to discipline>

[AND

3. **When the defendant acted, (he/she) was not reasonably disciplining a child.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *child* is any person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

A *traumatic physical condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

A (punishment/ [and/or] injury) *caused* a traumatic physical condition if:

1. **The traumatic condition was the natural and probable consequence of the (punishment/ [and/or] injury);**
2. **The (punishment/ [and/or] injury) was a direct and substantial factor in causing the condition;**

AND

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3. The condition would not have happened without the (punishment/ [and/or] injury).

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the traumatic condition.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].) Give bracketed element 3 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 273d(a).
- Willful Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Child Defined. *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [victim's size and age relevant to reasonableness of corporal punishment]; see Fam. Code, § 6500.
- Duty to Define Traumatic Condition. *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- General Intent Crime. *People v. Atkins* (1975) 53 Cal.App.3d 348, 358 [125 Cal.Rptr. 855].

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- Traumatic Condition Defined. *People v. Thomas* (1976) 65 Cal.App.3d 854, 857 [135 Cal.Rptr. 644]; *People v. Stewart* (1961) 188 Cal.App.2d 88, 91 [10 Cal.Rptr. 217]; see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 951–953 [217 Cal.Rptr. 616] [in context of Pen. Code, § 273.5].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 164, 165.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[2], 142.23[7] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment. Pen. Code, §§ 664, 273d.
- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242; see *People v. Sargent* (1999) 19 Cal.4th 1206, 1220 [81 Cal.Rptr.2d 835, 970 P.2d 409]; *People v. Stewart* (1961) 188 Cal.App.2d 88, 89 [10 Cal.Rptr. 217].

Willfully causing or permitting a child to suffer, or willfully inflicting on a child, unjustifiable physical pain or mental suffering under circumstances other than those likely to produce great bodily harm or death (Pen. Code, § 273a(b)) is not a lesser included offense of Penal Code section 273d. (See *People v. Lofink* (1988) 206 Cal.App.3d 161, 166 [253 Cal.Rptr. 384].)

RELATED ISSUES

Spanking

It is not unlawful for a parent to spank a child for disciplinary purposes with an object other than the hand. The punishment, however, must be necessary and not excessive in relation to the individual circumstances. (80 Ops.Cal.Atty.Gen. 203 (1997).)

(New January 2006)

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823. Child Abuse

The defendant is charged [in Count ____] with child abuse.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on a child;]

<Alternative 1B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering;]

<Alternative 1C—while having custody, caused or permitted to suffer injury>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child's person or health to be injured;]

<Alternative 1D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health might have been endangered;]

<Give element 2 when giving alternative 1B, 1C, or 1D.>

[AND]

[2. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer[,]/ [or] be injured[,]/ [or] be endangered)(;/.)]

<Give element 2/3 when instructing on parental right to discipline.>

[AND

(2/3). The defendant did not act while reasonably disciplining a child.]

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Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *child* is any person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. **He or she acts in a reckless way that creates a high risk of death or great bodily harm;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].) Give bracketed element 2/3 and CALCRIM No. 3405, *Parental Right to Punish a Child.*

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is

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alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give alternative 1C. Finally, give alternative 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(b).)

Give bracketed element 2 and the bracketed definition of "criminal negligence" if alternative 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780].)

Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity or degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 273a(b); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- Child Defined. See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- Willfully Defined. Pen. Code, § 7(1); see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct. *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr.1, 763 P.2d 852].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering. *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53

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Cal.App.3d 348, 358 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–165.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[1], 142.23[7] (Matthew Bender).

COMMENTARY

See Commentary to CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

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(ii) Elder or Dependent Adult

830. Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death

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The defendant is charged [in Count ____] with (elder/dependent adult) abuse likely to produce great bodily harm or death.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>***;]**

<Alternative B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted _____ *<insert name or description of elder or dependent adult>* **to suffer unjustifiable physical pain or mental suffering;]**

<Alternative C—while having custody, caused or permitted to be injured>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>* **willfully caused or permitted (his/her) person or health to be injured;]**

<Alternative D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>* **willfully caused or permitted (him/her) to be placed in a situation where (his/her) person or health was endangered;]**

2. The defendant (inflicted suffering on _____ *<insert name or description of elder or dependent adult>*/ **[or] caused or permitted _____** *<insert name of elder or*

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dependent adult> **to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce great bodily harm or death;**

3. _____ <*insert name or description of elder or dependent adult*> **(is/was) (an elder/a dependent adult)(;/.)**

[AND]

4. When the defendant acted, (he/she) knew or reasonably should have known that _____ <*insert name or description of elder or dependent adult*> **was (an elder/a dependent adult)(;/.)**

<*Give element 5 when giving alternative 1B and it is alleged the defendant permitted the suffering.*>

[AND]

[5. The defendant had a legal duty to supervise and control the conduct of the person[s] who caused or inflicted unjustifiable physical pain or mental suffering on _____ <*insert name or description of elder or dependent adult*>**, but failed to supervise or control that conduct(;/.)]**

<*Give element 6 when giving alternative 1B, 1C, or 1D.*>

[AND

6. The defendant was criminally negligent when (he/she) caused or permitted _____ <*insert name or description of elder or dependent adult*> **to (suffer/ [or] be injured/ [or] be endangered).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. [This definition includes an adult who has physical or

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developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[A person who does not have care or custody of (an elder/a dependent adult) may still have a *legal duty to supervise and control the conduct of a third person* who can inflict abuse on the (elder/dependent adult) if the person has a special relationship with the third person. A special relationship is created, for example, when (1) a person takes charge of a third person whom (he/she) knows or should know is likely to cause bodily harm to others if not controlled, and (2) the person has the ability to control the third person's conduct.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. **He or she acts in a reckless way that creates a high risk of death or great bodily harm;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[(An elder/A dependent adult) does not need to actually suffer great bodily harm. But if (an elder/a dependent adult) does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted an elder or dependent adult to suffer. If it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant caused or permitted the elder's or dependent adult's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant endangered the elder's or dependent adult's person or health. (See Pen. Code, § 368(b)(1).)

Give bracketed element 5 if it is alleged under element 1B that the defendant *permitted* an elder or dependent adult to suffer unjustifiable pain or mental suffering. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].) If element 5 is given, also give the bracketed paragraph defining who has a "legal duty to control the conduct of a third person."

Give bracketed element 6 regarding criminal negligence, and the bracketed definition of "criminally negligent," if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect act. (*People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619], disapproved on other grounds by *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335], disapproved on other grounds by *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780] [latter two cases in context of parallel child abuse statute].)

Give the bracketed definition of "elder" or "dependent adult" depending on the status of the alleged victim. (See Pen. Code, § 368(g) & (h).)

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Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity for or the degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

If there is a question whether an elder or dependent adult suffered great bodily harm, give on request the bracketed paragraph stating that a person "does not need to actually suffer great bodily harm." (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771] [in context of parallel child abuse statute].)

If a victim actually suffers great bodily injury or dies, the defendant's sentence may be enhanced based on the victim's age. (See Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198 [113 Cal.Rptr.2d 722].) Give CALCRIM No. 3162, *Great Bodily Injury: Age of Victim*, or any other appropriate instructions on enhancements. (See series 3100–3399.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 368(b)(1).
- Great Bodily Harm or Injury Defined. Pen. Code, §§ 368(b)(2), 12022.7(f); see *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519] [in context of parallel child abuse statute].
- Sentence Enhancements. Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198 [113 Cal.Rptr.2d 722].
- Willful Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct. *People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335]; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780] [in context of parallel child abuse statute].

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- Duty to Control Conduct of Person Inflicting Abuse. *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering. See *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409] [in context of parallel child abuse statute].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 168–170.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.11[1][f], 142.13[5] (Matthew Bender).

COMMENTARY

Any violation of Penal Code section 368(b)(1) must be willful. (See *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519] [both in context of parallel child abuse statute]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511] [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes,* the committee has included "willfully" in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

LESSER INCLUDED OFFENSES

- Attempted Abuse of Elder or Dependent Adult. Pen. Code, §§ 664, 368(b)(1).
- Misdemeanor Abuse of Elder or Dependent Adult. Pen. Code, § 368(c).

RELATED ISSUES

Care or Custody

"The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (See *People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [90 Cal.Rptr.2d

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578] [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257]; both in context of parallel child abuse statute].)

Unanimity

The court has a sua sponte duty to instruct on unanimity when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].) However, the court does not have to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777].) Elder abuse may be a continuous course of conduct or a single, isolated incident. (*People v. Rae* (2002) 102 Cal.App.4th 116, 123 [125 Cal.Rptr.2d 312].) The court should carefully examine the statute charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*People v. Napoles, supra,* 104 Cal.App.4th at pp. 115–116.) See generally CALCRIM No. 3500, *Unanimity*.

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831. Abuse of Elder or Dependent Adult

The defendant is charged [in Count ____] with (elder/dependent adult) abuse.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>***;]**

<Alternative 1B—caused or permitted to suffer pain>

[1. The defendant allowed someone, whose conduct the defendant had a duty to supervise and control, to inflict unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>***;]**

<Alternative 1C—while having custody, caused or permitted to be injured>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>***, willfully caused or permitted that person or (his/her) health to be injured;]**

<Alternative 1D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>***, willfully caused or permitted that person to be placed in a situation where (his/her) person or health was endangered;]**

2. _____ *<insert name or description of elder or dependent adult>* **(is/was) (an elder/a dependent adult);**

[AND]

3. When the defendant acted, (he/she) knew or reasonably should have known that _____ *<insert name or description of elder or dependent adult>* **was (an elder/a dependent adult)(;/.)**

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<Give element 4 when giving alternative 1B and it is alleged the defendant permitted the suffering.>

[AND]

[4. The defendant had a legal duty to supervise and control the conduct of the person[s] who caused or inflicted unjustifiable physical pain or mental suffering on _____ <*insert name or description of elder or dependent adult*>, but failed to supervise or control that conduct(;/.)]

<Give element 5 when giving alternative 1B, 1C, or 1D.>

[AND

(4/5). The defendant was criminally negligent when (he/she) caused or permitted _____ <*insert name or description of elder or dependent adult*> to (suffer[,]/ [or] be injured[,]/ [or] be endangered).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[A person who does not have care or custody of (an elder/a dependent adult) may still have a *legal duty to supervise and control the conduct of a third person* who can inflict abuse on the (elder/dependent adult) if the person has a special relationship with the third person. A special relationship is created, for example, when (1) a person takes charge of a third person whom

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(he/she) knows or should know is likely to cause bodily harm to others if not controlled, and (2) the person has the ability to control the third person's conduct.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. **He or she acts in a reckless way that creates a high risk of death or great bodily harm;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 1B if it is alleged that the defendant caused or permitted an elder or dependent adult to suffer. If it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant caused or permitted the elder's or dependent adult's person or health to be injured, give alternative 1C. Finally, give alternative 1D if it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant endangered the elder's or dependent adult's person or health. (See Pen. Code, § 368(c).)

Give bracketed element 4 if it is alleged under alternative 1B that the defendant *permitted* an elder or dependent adult to suffer unjustifiable pain

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or mental suffering. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].) If element 4 is given, also give the bracketed paragraph defining who has a "legal duty to supervise and control the conduct of a third person."

Give bracketed element 5 regarding criminal negligence, and the bracketed definition of "criminal negligence," if alternative 1B, 1C, or 1D is given alleging that the defendant committed any indirect act. (*People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619], disapproved on other grounds in *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335], disapproved on other grounds in *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780] [latter two cases in context of parallel child abuse statute].)

Give the bracketed definition of "elder" or "dependent adult" depending on the status of the alleged victim. (See Pen. Code, § 368(g) & (h).)

Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity for or the degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 368(c).
- Willfully Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct. *People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335]; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780] [in context of parallel child abuse statute].

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- Duty to Control Conduct of Person Inflicting Abuse. *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering. See *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409] [in context of parallel child abuse statute].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 168–170.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[5] (Matthew Bender).

COMMENTARY

See Commentary to CALCRIM No. 830, *Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death*.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 830, *Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death*.

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(iii) Spouse, etc.

840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition

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The defendant is charged [in Count ____] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child) that resulted in a traumatic condition.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully [and unlawfully] inflicted a physical injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child);**

[AND]

2. **The injury inflicted by the defendant resulted in a traumatic condition.**

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

[The term *cohabitants* means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4)

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the parties' holding themselves out as (husband and wife/ domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under law to be the natural father. _____ <*insert name of presumed father*> is presumed under law to be the natural father of _____ <*insert name of child*>.]

[A traumatic condition is the *result of* an injury if:

1. **The traumatic condition was the natural and probable consequence of the injury;**
2. **The injury was a direct and substantial factor in causing the condition;**

AND

3. **The condition would not have happened without the injury.**

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Give the bracketed paragraph that begins, "A traumatic condition is the *result of* an injury if . . . ."

If there is sufficient evidence that an alleged victim's injuries were caused by an accident, the court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.

Give the bracketed language "[and unlawfully]" in element 1 if there is evidence that the defendant acted in self-defense.

Give the third bracketed sentence that begins "A person may cohabit simultaneously with two or more people," on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins "A person is considered to be the (mother/father)" if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

If the defendant is charged with an enhancement for a prior conviction for a similar offense within seven years and has not stipulated to the prior conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*. If the court has granted a bifurcated trial, see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements. Pen. Code, § 273.5(a).
- Traumatic Condition Defined. Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Willful Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

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- Cohabitant Defined. *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force. *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition. *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- General Intent Crime. See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra, *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation. *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 63, 64.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse. Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting "traumatic condition"].
- Misdemeanor Battery. Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent. Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Simple Assault. Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

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RELATED ISSUES

Continuous Course of Conduct

Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225 [206 Cal.Rptr. 516].)

Multiple Acts of Abuse

A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [18 Cal.Rptr.2d 274].)

Prospective Parents of Unborn Children

Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. "A pregnant woman is not a 'mother' and a fetus is not a 'child' as those terms are used in that section." (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129 [72 Cal.Rptr.2d 531].)

Termination of Parental Rights

Penal Code section 273.5 "applies to a man who batters the mother of his child even after parental rights to that child have been terminated." (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356 [59 Cal.Rptr.2d 801].)

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841. Simple Battery: Against Spouse, Cohabitant, or Fellow Parent

The defendant is charged [in Count ____] with battery against [his/her] ([former] spouse/[former] cohabitant/fiancé[e]/a person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/the (mother/father) of (his/her) child).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully [and unlawfully] touched _____ <*insert name of complaining witness*> in a harmful or offensive manner;**

[AND]

2. **_____ <*insert name of complaining witness*> is (the/a) (defendant's [former] spouse/defendant's [former] cohabitant/defendant's fiancé[e]/person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/(mother/father) of the defendant's child)(;/.)**

<Give element 3 when instructing on self-defense or defense of another.>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

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[The term *cohabitants* means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/ domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under the law to be the natural father. _____ <*insert name of presumed father*> is presumed under law to be the natural father of _____ <*insert name of child*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed language "[and unlawfully]" in element 1 if there is evidence that the defendant acted in self-defense.

Give the bracketed paragraph on indirect touching if that is an issue.

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Give the third bracketed sentence that begins with "A person may cohabit simultaneously with two or more people" on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins with "A person is considered to be the (mother/father)" if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

AUTHORITY

- Elements. Pen. Code, § 243(e)(1).
- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Cohabitant Defined. *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Dating Relationship Defined. Pen. Code, § 243(f)(10).
- Simultaneous Cohabitation. *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 19.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, §§ 242, 243(a).

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RELATED ISSUES

See the Related Issues section of CALCRIM No. 960, *Simple Battery*.

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(iv) Evidence

850. Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness

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You have heard testimony from _____ <*insert name of expert*> regarding the effect of (battered women's syndrome/ intimate partner battering/_____ <*insert other description used by expert for syndrome*>).

_____'s <*insert name of expert*> testimony about (battered women's syndrome/intimate partner battering/_____ <*insert other description used by expert for syndrome*>) is not evidence that the defendant committed any of the crimes charged against (him/her).

You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged victim of abuse*> conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of (his/her) testimony.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on intimate partner battering and its effects, previously referred to as battered women's syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [sua sponte duty in context of child sexual abuse accommodation syndrome]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 250 [203 Cal.Rptr. 450, 681 P.2d 291] [rape trauma syndrome not admissible to prove rape occurred].) In *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574], the Supreme Court held that testimony from an expert in battered women's syndrome could be admitted under Evidence Code section 801 even though there was no evidence of prior incidents of violence between the defendant and the alleged victim. The court held that the expert could testify generally about the "cycle of violence" and the frequency of recantation by victims of domestic abuse, without testifying specifically about "battered

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women's syndrome". *(Ibid.)* It is unclear if the court is required to give a cautionary admonition sua sponte when such evidence is admitted.

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General* and CALCRIM No. 332, *Expert Witness Testimony*.

See also CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

AUTHORITY

- Instructional Requirements. See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Abuse Defined. Evid. Code, § 1107(c); Fam. Code, § 6203.
- Domestic Violence Defined. Evid. Code, § 1107(c); Fam. Code, § 6211.
- Relevant After Single Incident of Abuse. See *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 [93 Cal.Rptr.2d 356].
- Relevant to Rehabilitate Victim's Credibility. *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595 [92 Cal.Rptr.2d 890] [victim recanted incident and reunited with abuser]; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215–1217 [68 Cal.Rptr.2d 772] [victim recanted].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 48–51.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][C] (Matthew Bender).

RELATED ISSUES

Assumptions Underlying Expert Testimony

It is unnecessary, and potentially misleading, to instruct that the expert testimony assumes that physical or mental abuse has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child sexual abuse accommodation syndrome].)

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Definition and Preferred Name

In 2004, the Legislature amended Evidence Code section 1107(d), changing all references from "battered women's syndrome" to "intimate partner battering and its effects." Previous decisional law continues to apply. (Evid. Code, § 1107(f).) Battered women's syndrome has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083–1084 [56 Cal.Rptr.2d 142, 921 P.2d 1].) The Supreme Court had previously noted that experts prefer to call the syndrome "expert testimony on battered women's experiences." (See *People v. Humphrey, supra,* 13 Cal.4th at pp. 1083–1084, fn. 3.)

No Testimony on Actual State of Mind

While evidence is admissible "to explain how [a] defendant's asserted subjective perception of a need to defend herself 'would reasonably follow from the defendant's experience as a battered woman,' " an expert may not give an opinion "that the defendant *actually perceived* that she was in danger and needed to defend herself." (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1400, 1401 [67 Cal.Rptr.2d 740] [§ 1107(a) codifies existing rules regarding battered women's syndrome testimony; original italics].) Section 1107 "does not create an exception to Penal Code section 29," which prohibits an expert who is testifying about a mental defect from testifying about whether a defendant had a required mental state. (*People v. Erickson, supra,* 57 Cal.App.4th at pp. 1401–1402 [syndrome was characterized as mental defect].)

(New January 2006)

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851. Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense

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You have heard testimony from _____ <*insert name of expert*> regarding the effect of (battered women's syndrome/ intimate partner battering/_____ <*insert other description used by expert for syndrome*>).

_____'s <*insert name of expert*> testimony about (battered women's syndrome/intimate partner battering/_____ <*insert other description used by expert for syndrome*>) is not evidence that the defendant committed any of the crimes charged against (him/her).

You may consider this evidence only in deciding whether the defendant actually believed that (he/she) needed to defend (himself/herself) against an immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable.

When deciding whether the defendant's belief was reasonable or unreasonable, consider all the circumstances as they were known by or appeared to the defendant. Also consider what conduct would appear to be necessary to a reasonable person in a similar situation with similar knowledge.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on intimate partner battering and its effects, previously known as battered women's syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [sua sponte duty in context of child sexual abuse accommodation syndrome]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 250 [203 Cal.Rptr. 450, 681 P.2d 291] [rape trauma syndrome not admissible to prove rape occurred].)

The court may need to modify this instruction if the defense offers testimony on intimate partner battering and its effects on an issue other than whether the defendant actually and reasonably believed in the need for

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self-defense. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 98–101 [17 Cal.Rptr.3d 710, 96 P.3d 30] [evidence offered to show defendant did not act with intent to kill but acted out of fear of codefendant].)

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General* and CALCRIM No. 332, *Expert Witness Testimony*.

See also:

CALCRIM No. 850, *Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness*.

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense*.

AUTHORITY

- Instructional Requirements. See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111, fn. 6 [119 Cal.Rptr.2d 470].
- Abuse Defined. Evid. Code, § 1107(c); Fam. Code, § 6203.
- Domestic Violence Defined. Evid. Code, § 1107(c); Fam. Code, § 6211.
- Relevant After Single Incident of Abuse. See *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 [93 Cal.Rptr.2d 356].
- Relevant to Claim of Self-Defense. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1083, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 48–51.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][C]; Ch. 73, *Defenses and Justifications*, § 73.11[1][c] (Matthew Bender).

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RELATED ISSUES

See the Related Issues section of CALCRIM No. 850, *Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness*.

(New January 2006)

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852. Evidence of Uncharged Domestic Violence

The People presented evidence that the defendant committed domestic violence that was not charged in this case[, specifically: _____ <*insert other domestic violence alleged*>.]

<Alternative A—As defined in Pen. Code, § 13700>

[*Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).]

<Alternative B—As defined in Fam. Code, § 6211>

[*Domestic violence* means abuse committed against a (child/ grandchild/parent/grandparent/brother/sister) of the defendant.]

***Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

[The term *cohabitants* means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a

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preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged offense[s] involving domestic violence*>, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged offense[s] involving domestic violence*>. The People must still prove each element of every charge beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>].]

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other domestic violence has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the

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court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

The definition of "domestic violence" contained in Evidence Code section 1109(d) was amended, effective January 1, 2006. The definition is now in subd. (d)(3), which states that, as used in section 1109:

> 'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

If the court determines that the evidence is admissible pursuant to the definition of domestic violence contained in Penal Code section 13700, give the definition of domestic violence labeled alternative A. If the court determines that the evidence is admissible pursuant to the definition contained in Family Code section 6211, give the definition labeled alternative B.

Depending on the evidence, give on request the bracketed paragraphs defining "emancipated minor" (see Fam. Code, § 7000 et seq.) and "cohabitant" (see Pen. Code, § 13700(b)).

In the paragraph that begins with "If you decide that the defendant committed," the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the final sentence that begins with "Do not consider" on request.

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Related Instructions

- CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*
- CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.
- CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

AUTHORITY

- Instructional Requirement. Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Abuse Defined. Pen. Code, § 13700(a).
- Cohabitant Defined. Pen. Code, § 13700(b).
- Domestic Violence Defined. Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law. Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Trial, § 640.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 98.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13 (Matthew Bender).

COMMENTARY

The paragraph that begins with "If you decide that the defendant committed" tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with "If you decide that the defendant committed the uncharged domestic violence" may be replaced with the following:

> If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged offense involving domestic violence*>. Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of _____ <*insert charged offense involving domestic violence*>. The People must still prove each element of _____ <*insert charged offense involving domestic violence*> beyond a reasonable doubt.

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1109 does not violate a defendant's rights to due process (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096 [98 Cal.Rptr.2d 696]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–1029 [92 Cal.Rptr.2d 208]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [91 Cal.Rptr.2d 596]; see *People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182] (construing Evid. Code, § 1108, a parallel statute to Evid. Code, § 1109); *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870] (construing Evid. Code, § 1108) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th

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1301, 1310–1313 [97 Cal.Rptr.2d 727]; see *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 [63 Cal.Rptr.2d 753] (construing Evid. Code, § 1108).

Exceptions

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

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853. Evidence of Uncharged Abuse of Elder or Dependent Person

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The People presented evidence that the defendant committed abuse of (an elder/a dependent person) that was not charged in this case[, specifically: _____ <*insert other abuse alleged*>.] *Abuse of* (*an elder/a dependent person*) means (physical abuse[,] [or] sexual abuse[,]/ [or] neglect[,]/ [or] financial abuse[,]/ [or] abandonment[,]/ [or] isolation[,]/ [or] abduction[,]/[or] the act by a care custodian of not providing goods or services that are necessary to avoid physical harm or mental suffering[,]/ [or] [other] treatment that results in physical harm or pain or mental suffering).

[An *elder* is a person residing in California who is age 65 or older.]

[A *dependent person* is a person who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have significantly diminished because of age.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged abuse of (an elder/a dependent person). Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit abuse of (an elder/a dependent person), and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged offense[s] involving abuse of elder or dependent person*>, as

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charged here. If you conclude that the defendant committed the uncharged abuse of (an elder/a dependent person), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged offense[s] involving abuse of elder or dependent person*>. The People must still prove each element of every charge beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>].]

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other abuse of an elder or dependent person has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

Depending on the evidence, give on request the bracketed definition of an elder or dependent person. (See Welf. & Inst. Code, §§ 15610.23 [dependent adult], 15610.27 [elder].) Other terms may be defined on request depending on the evidence. See the Authority section below for

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references to selected definitions from the Elder Abuse and Dependent Adult Civil Protection Act. (See Welf. & Inst. Code, § 15600 et seq.)

In the paragraph that begins with "If you decide that the defendant committed," the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with "Do not consider" on request.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, or Common Plan, etc.*

CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*.

CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

AUTHORITY

- Instructional Requirement. Evid. Code, § 1109(a)(2).
- Abandonment Defined. Welf. & Inst. Code, § 15610.05.
- Abduction Defined. Welf. & Inst. Code, § 15610.06.
- Abuse of Elder or Dependent Person Defined. Evid. Code, § 1109(d)(1).
- Care Custodian Defined. Welf. & Inst. Code, § 15610.17.
- Dependent Person Defined. Evid. Code, § 177.
- Elder Defined. Welf. & Inst. Code, § 15610.27.
- Financial Abuse Defined. Welf. & Inst. Code, § 15610.30.
- Goods and Services Defined. Welf. & Inst. Code, § 15610.35.
- Isolation Defined. Welf. & Inst. Code, § 15610.43.
- Mental Suffering Defined. Welf. & Inst. Code, § 15610.53.
- Neglect Defined. Welf. & Inst. Code, § 15610.57.
- Physical Abuse Defined. Welf. & Inst. Code, § 15610.63.
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d

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708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].

- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [in context of prior domestic violence offenses]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 98.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[5] (Matthew Bender).

COMMENTARY

The paragraph that begins with "If you decide that the defendant committed" tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with "If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person)" may be replaced with the following:

> If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged offense involving abuse of elder or dependent person*>. Remember, however, that evidence of uncharged abuse of (an elder/a

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dependent person) is not sufficient alone to find the defendant guilty of _____ <*insert charged offense involving abuse of elder or dependent person*>. The People must prove each element of _____ <*insert charged offense involving abuse of elder or dependent person*> beyond a reasonable doubt.

RELATED ISSUES

Exceptions

Evidence of abuse of an elder or dependent person occurring more than 10 years before the charged offense is inadmissible under Evidence Code section 1109, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*; CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*; and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

(New January 2006)

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D. ASSAULT

(i) With Weapon or Force Likely

(A) On Specified People

860. Assault on Firefighter or Peace Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury

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The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) on a (firefighter/peace officer).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with (a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon/with a firearm/with a semiautomatic

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firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person;

5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer) who was performing (his/her) duties(;/.)

<Give element 7 when instructing on self-defense or defense of another>

[AND

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

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[Voluntary intoxication is not a defense to assault.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *machine gun* is any weapon that (shoots/is designed to shoot/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.]

[An *assault weapon* includes _____ <*insert names of appropriate designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1*>**.]**

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base of the cartridge to the tip of the bullet;**
2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

AND

3. **The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]**

[The term[s] (*great bodily injury[,]/ deadly weapon[,]/ firearm[,]/ machine gun[,]/assault weapon[,]/* [and] *.50 BMG rifle)* (is/are) defined in another instruction to which you should refer.]

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[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> is a *peace officer* if _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>.]

[The duties of a _____ <*insert title of officer*> include _____ <*insert job duties*>.]

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If

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excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give element 1A if it is alleged the assault was committed with a deadly weapon, a firearm, a semiautomatic firearm, a machine gun, an assault weapon, or .50 BMG rifle. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(c) & (d).)

Give the bracketed definition of "application or force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title* . . . .> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1.
- Firearm Defined. Pen. Code, § 12001(b).
- Machine Gun Defined. Pen. Code, § 12200.
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Firefighter Defined. Pen. Code, § 245.1.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With a Deadly Weapon. Pen. Code, § 245.
- Assault on a Peace Officer. Pen. Code, § 241(b).

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RELATED ISSUES

See the Related Issues section to CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

(New January 2006)

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861. Assault on Firefighter or Peace Officer With Stun Gun or Taser®

The defendant is charged [in Count ____] with assault with a (stun gun/[or] Taser®) on a (firefighter/peace officer).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act with a (stun gun/[or] Taser®) that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] Taser®) to a person;**
5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);**

[AND]

6. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer) who was performing (his/her) duties(;/.)**

<Give element 7 when instructing on self-defense or defense of another>

[AND

7. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

[A *stun gun* is anything, except a Taser®, that is used or intended to be used as either an offensive or defensive weapon and is capable of temporarily immobilizing someone by inflicting an electrical charge.]

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Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

[The duties of a _____ <*insert title of officer*> **include** _____ <*insert job duties*>**.]**

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire

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department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758

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P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 244.5.
- Firefighter Defined. Pen. Code, § 245.1.
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Taser Described. See *People v. Heffner* (1977) 70 Cal.App.3d 643, 647 [139 Cal.Rptr. 45].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3]; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

(New January 2006)

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862. Assault on Custodial Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury

The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon) on a custodial officer.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a custodial officer;

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, both that the person assaulted was a custodial officer and that (he/she) was performing (his/her) duties as a custodial officer(;/.)

<Give element 7 when instructing on self-defense or defense of another>

[AND

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7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[The term[s] (*great bodily injury/ [and] deadly weapon)* (is/are) defined in another instruction to which you should refer.]

A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody

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of prisoners, and helps operate a local detention facility. [A (county jail/city jail/_____ <*insert other detention facility*>) is a local detention facility.] [A custodial officer is not a peace officer.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer.*

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.3.)

Give the bracketed definition of "application or force and apply force" on request.

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Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the bracketed definition of "local detention facility," do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.3.
- Custodial Officer Defined. Pen. Code, § 831.
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

(New January 2006)

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863. Assault on Transportation Personnel or Passenger With Deadly Weapon or Force Likely to Produce Great Bodily Injury

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The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon) on (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 245.2*>.

To prove that the defendant is guilty of this crime, the People must prove that:

<*Alternative 1A—force with weapon*>

[1. The defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<*Alternative 1B—force without weapon*>

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

<*Alternative 5A—transportation personnel*>

[5. When the defendant acted, the person assaulted was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 245.2*>;]

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<Alternative 5B—passenger>

[5. The person assaulted was a passenger of (a/an) _____ *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>***;]**

[AND]

6. When the defendant acted, (he/she) knew, or reasonably should have known, [both] that the person assaulted was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____ *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>* **[and that (he/she) was performing (his/her) duties](;/.)**

<Give element 7 when instructing on self-defense or defense of another>

[AND

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

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[Voluntary intoxication is not a defense to assault.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[The term[s] (*great bodily injury*/ [and] *deadly weapon*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.2.)

If the victim was an operator, driver, station agent, or ticket agent of an identified vehicle or transportation entity, give element 5A and the bracketed language in element 6. If the victim was a passenger, give element 5B and omit the bracketed language in element 6.

Give the bracketed definition of "application or force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

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AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.2.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 72.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3]; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

(New January 2006)

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(B) General

875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury

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The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with (a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person(;/.)

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<Give element 5 when instructing on self-defense or defense of another>

[AND

5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

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[A *machine gun* is any weapon that (shoots/is designed to shoot/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.]

[An *assault weapon* includes _____ <*insert names of appropriate designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1*>.]

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base of the cartridge to the tip of the bullet;**
2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

AND

3. **The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]**

[The term[s] (*great bodily injury[,]/ deadly weapon[,]/ firearm[,]/ machine gun[,]/assault weapon[,]/* [and] *.50 BMG rifle)* (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give element 1A if it is alleged the assault was committed with a deadly weapon, firearm, semiautomatic firearm, machine gun, an assault weapon,

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or .50 BMG rifle. Give 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(a).)

Give the bracketed definition of "application or force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1.
- Firearm Defined. Pen. Code, § 12001(b).
- Machine Gun Defined. Pen. Code, § 12200.
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 40–47.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

RELATED ISSUES

Semiautomatic Firearm Need Not be Operable

Assault with a semiautomatic weapon does not require proof that the gun was operable as a semiautomatic at the time of the assault. A person may commit an assault under Penal Code section 245(b) by using the gun as a club or bludgeon, regardless of whether he or she could also have fired it in a semiautomatic manner at that moment. (*People v. Miceli* (2002) 104 Cal.App.4th 256 [127 Cal.Rptr.2d 888].)

(New January 2006)

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876. Assault With Stun Gun or Taser®

The defendant is charged [in Count ____] with assault with a (stun gun/[or] Taser®).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act with a (stun gun/[or] Taser®) that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**

[AND]

4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] Taser®) to a person(;/.)**

<Give element 5 when instructing on self-defense or defense of another>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

[A stun gun is anything, except a Taser®, that is used or intended to be used as either an offensive or defensive weapon and is capable of temporarily immobilizing someone by inflicting an electrical charge.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is

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enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 244.5.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

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- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Taser® Described. See *People v. Heffner* (1977) 70 Cal.App.3d 643, 647 [139 Cal.Rptr. 45].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 52.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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877. Assault With Caustic Chemicals

The defendant is charged [in Count ____] with (placing/ [or] throwing) caustic chemicals on someone else.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously (placed[,]/ threw[,]/ caused to be placed[,]/ [or] caused to be thrown) any (caustic chemical[,]/ corrosive acid[,]/ flammable substance[,]/ [or] vitriol) on someone else;**

[AND]

2. **When the defendant acted, (he/she) intended to injure the flesh of or disfigure the other person's body(;/.)**

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

[A *flammable substance* includes gasoline, petroleum products, or flammable liquids with a flashpoint of 150 degrees Fahrenheit or less.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

AUTHORITY

- Elements. Pen. Code, § 244.
- Malicious Defined. Pen. Code, § 7(4).
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Simple Assault Not a Lesser Included Offense. *People v. Warren* (1963) 223 Cal.App.2d 798, 801 [36 Cal.Rptr. 127].
- Threat of Great Bodily Harm Not Required. *People v. Day* (1926) 199 Cal. 78, 85–86 [248 P. 250].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 53.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

COMMENTARY

Although Penal Code section 244 is titled "assault with caustic chemicals," this statute does not truly define an assault crime since actual contact with the other person is required.

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(ii) With Intent to Commit Other Offense

890. Assault With Intent to Commit Sex Offense

The defendant is charged [in Count ____] with assault with intent to commit _____ <*specify sex offense[s] listed in Pen. Code, § 220*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

AND

5. **When the defendant acted, (he/she) intended to commit _____ <*specify sex offense[s] listed in Pen. Code, § 220*>.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

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[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

To decide whether the defendant intended to commit _____ <*specify sex offense[s] listed in Pen. Code, § 220*> please refer to Instruction[s] _____ which define[s] (that/those) crime[s].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats* [alternative paragraph on reasonable and actual belief in consent].)

The court has a **sua sponte** duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 288a [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

Related Instructions

CALCRIM No. 915, *Simple Assault*.

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AUTHORITY

- Elements. Pen. Code, § 220.
- Elements for Assault. Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Court Must Instruct on Elements of Intended Crime. *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].
- Intent to Commit Sex Offense. *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847] [assault to commit rape is complete at any moment during the assault when the accused intends to use whatever force may be required].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sex Offense. Pen. Code, §§ 663, 261, 264.1, 286, 288, 288a, 289; see *People v. De Porceri* (2003) 106 Cal.App.4th 60, 68–69 [130 Cal.Rptr.2d 280].
- Simple Assault. Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160].

Attempted sexual battery (Pen. Code, §§ 243.4, 664) is not a necessarily included offense of assault to commit rape. (*People v. Dixon* (1999) 75 Cal.App.4th 935, 943 [89 Cal.Rptr.2d 602].)

There is no crime of attempted assault to commit rape. (*People v. Duens* (1976) 64 Cal.App.3d 310, 314 [134 Cal.Rptr. 341].)

RELATED ISSUES

Abandonment

Assault with intent to commit rape is complete at any point during the incident when the defendant entertains the intent to have sexual intercourse with his victim by force. "It makes no difference whatsoever that he later abandons that intent." (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223

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[207 Cal.Rptr. 165]; see *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847].)

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891. Assault With Intent to Commit Mayhem

The defendant is charged [in Count ____] with assault with intent to commit mayhem.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

AND

5. **When the defendant acted, (he/she) intended to commit mayhem.**

The defendant intended to commit mayhem if (he/she) intended to unlawfully and maliciously:

[1. Removed a part of someone's body(;/.)]

[OR]

[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

[OR]

[3. Permanently disfigured someone(;/.)]

[OR]

[4. Cut or disabled someone's tongue(;/.)]

[OR]

[5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)]

[OR]

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[6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the evidence, select the appropriate elements of mayhem. (See *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502]

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[in context of assault to commit rape].) See generally CALCRIM No. 801, *Mayhem*.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

Related Instructions

CALCRIM No. 915, *Simple Assault*.

AUTHORITY

- Elements. Pen. Code, § 220.
- Elements for Assault. Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Elements for Mayhem. Pen. Code, § 203.
- Court Must Instruct on Elements of Intended Crime. *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502] [in context of assault to commit rape].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.11, 142.16 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Mayhem. Pen. Code, §§ 663, 203.
- Simple Assault. Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160] [in context of charged assault with intent to commit rape].

There is no crime of attempted assault to commit an offense. (See *People v. Duens* (1976) 64 Cal.App.3d 310, 314 [134 Cal.Rptr. 341] [in context of assault to commit rape].)

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RELATED ISSUES

Abandonment

An assault with intent to commit another crime is complete at any point during the incident when the defendant entertains the intent to commit the crime. "It makes no difference whatsoever that he later abandons that intent." (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223 [207 Cal.Rptr. 165]; *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847] [both in context of assault to commit rape].)

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(iii) Simple Assault on Specified People or in Specified Location

900. Assault on Firefighter or Peace Officer

The defendant is charged [in Count ____] with assault on a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b)*>).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act would directly, naturally, and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**
5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b)*>);**

[AND]

6. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b)*>) who was performing (his/her) duties(;/.)**

<Give element 7 when instructing on self-defense or defense of another.>

[AND

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7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[A person employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

[The duties of a _____ <*insert title of peace officer specified in Pen. Code, § 830 et seq.*> **include** _____ <*insert job duties*>**.]**

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire

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protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must also instruct that the People have the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) Give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

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The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title of peace officer specified in Pen. Code, § 830 et seq.*> include" on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1222.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 241(b).
- Firefighter Defined. Pen. Code, § 245.1.
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr. 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.

RELATED ISSUES

Resisting Arrest

"[A] person may not use force to resist any arrest, lawful or unlawful, except that he may use reasonable force to defend life and limb against excessive force . . . ." (*People v. Curtis* (1969) 70 Cal.2d 347, 357 [74 Cal.Rptr. 713, 450 P.2d 33].) "[I]f the arrest is ultimately determined factually to be unlawful [but the officer did not use excessive force], the defendant can be validly convicted only of simple assault or battery," not assault or battery of a peace officer. (*Id.* at pp. 355–356.) See CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*.

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901. Assault on Custodial Officer

The defendant is charged [in Count ____] with assault on a custodial officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**
5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a custodial officer;**

[AND]

6. **When the defendant acted, (he/she) knew, or reasonably should have known, both that the person assaulted was a custodial officer and that (he/she) was performing (his/her) duties as a custodial officer(;/.)**

<Give element 7 when instructing on self-defense or defense of another>

[AND

7. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact

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with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A (county jail/city jail/_____ <*insert other detention facility*>) is a local detention facility.] [A custodial officer is not a peace officer.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer.*

In the bracketed definition of "local detention facility," do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.1.
- Custodial Officer Defined. Pen. Code, § 831.
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

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902. Assault on Military Personnel

The defendant is charged [in Count ____] with assault on a member of the United States Armed Forces.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act would directly, naturally, and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**
5. **The person assaulted was a member of the United States Armed Forces at the time of the assault;**

[AND]

6. **The defendant knew the other person was a member of the United States Armed Forces and assaulted the other person because of that person's service(;/.)**

<Give element 7 when instructing on self-defense or defense of another.>

[AND

7. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is

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enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

A _____ <*insert description, e.g., "private in the United States Army"*> **is a *member of the United States Armed Forces.***

A person commits an assault *because of someone's service in the Armed Forces if:*

1. **That person is biased against the assaulted person based on the assaulted person's military service;**

AND

2. **That bias caused the person to commit the alleged assault.**

If the defendant had more than one reason to commit the alleged assault, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the assault.

[Voluntary intoxication is not a defense to assault.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on that defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The jury must determine whether the alleged victim is a member of the United States Armed Forces. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of member of the armed forces. However, the court may not instruct the jury that the alleged victim was a member of the armed forces as a matter of law. *(Ibid.)*

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.8.
- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.

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903. Assault on School District Peace Officer

The defendant is charged [in Count ____] with assault on a school district peace officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**
5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a school district peace officer;**

[AND]

6. **When the defendant acted, (he/she) knew, or reasonably should have known, both that the person assaulted was a school district peace officer and that (he/she) was performing (his/her) duties as a school district peace officer(;/.)**

<Give element 7 when instructing on self-defense or defense of another>

[AND

7. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be

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enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

A *school district peace officer* is a peace officer who is a member of a police department of a school district under Education Code section 38000.

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A school district peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed

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element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.4; Educ. Code, § 38000.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

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COMMENTARY

A school district peace officer is anyone so designated by the superintendent of the school district, but is not vested with general police powers. (See Educ. Code, § 38000(a).) The scope of authority for school district peace officers is set forth in Penal Code section 830.32. (See Educ. Code, § 38001.)

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904. Assault on School Employee

The defendant is charged [in Count ____] with assault on a school employee.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**
5. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a school employee [and that (he/she) was performing (his/her) duties as a school employee];**

[AND]

6. **(When the defendant acted, the person assaulted was performing (his/her) duties[,]/ [or] (The/the) defendant acted in retaliation for something the school employee had done in the course of (his/her) duties)(;/.)**

<Give element 7 when instructing on self-defense or defense of another>

[AND

7. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be

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enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

A *school employee* is any person employed as a permanent or probationary certificated or classified employee of a school district on a part-time or full-time basis, including a substitute teacher, student teacher, or school board member.

[It is not a defense that an assault took place off campus or outside of school hours.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the sole motivation alleged for the assault is retaliation, do not give the bracketed clause in element 4 and give only the second option in element 5.

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Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.6.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 20, 73.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

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905. Assault on Juror

The defendant is charged [in Count ____] with assault on a juror.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a party to a case for which a jury had been selected;**
2. **The defendant did an act that by its nature would directly and probably result in the application of force to someone who had been sworn as a juror [or alternate juror] to decide that case;**
3. **The defendant did that act willfully;**
4. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**

[AND]

5. **When the defendant acted, (he/she) had the present ability to apply force to a person(;/.)**

<Give element 6 when instructing on self-defense or defense of another.>

[AND

6. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[It is not a defense that an assault was committed after the trial was completed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.7.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

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- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

COMMENTARY

Unlike other statutes penalizing assault on a particular person, Penal Code section 241.7 does not state that the defendant must have known that the person assaulted was a juror. Thus, the committee has not included knowledge among the elements.

(New January 2006)

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906. Assault Committed on School or Park Property

The defendant is charged [in Count ____] with assaulting a person on (school/park) property.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

[AND]

5. **When the defendant acted, (he/she) was on (school/park) property.**

<Give element 6 when instructing on self-defense or defense of another>

[AND

6. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

[A *school* is any (elementary school/junior high school/four-year high school/senior high school/adult school [or any branch thereof]/opportunity school/continuation high school/regional occupational center/evening high school/technical school/ community college).]

[A *park* is any publicly maintained or operated park. It does not include any facility that is being used for professional sports or commercial events.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

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AUTHORITY

- Elements. Pen. Code, §§ 240, 241.2.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 22.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

(New January 2006)

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907. Assault Committed on Public Transportation Provider's Property or Vehicle

The defendant is charged [in Count ____] with assaulting a person on a public transportation provider's (property/vehicle).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

[AND]

5. **When the defendant acted, (he/she) was on (the property of a public transportation provider/a motor vehicle of a public transportation provider)(;/.)**

<Give element 6 when instructing on self-defense or defense of another>

[AND

6. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

A *public transportation provider* is a public or private operator of a (bus/taxicab/streetcar/cable car/trackless trolley/school bus/ [or] other motor vehicle) that transports people for (money/hire).

[A *motor vehicle* includes a vehicle that runs on stationary rails or on a track or rail suspended in the air.]

[The property of the transportation provider includes the entire station where public transportation is available and the parking lot reserved for those who use the system.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

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AUTHORITY

- Elements. Pen. Code, §§ 240, 241.3.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 6 (assault generally).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

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(iv) Simple Assault

915. Simple Assault

The defendant is charged [in Count ____] with assault.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**

[AND]

4. **When the defendant acted, (he/she) had the present ability to apply force to a person(;/.)**

<Give element 5 when instructing on self-defense or defense of another>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. Pen. Code, § 240.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197]; *People v. Wright* (2002) 100 Cal.App.4th 703, 706 [123 Cal.Rptr.2d 494].

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- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 6–11, 15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

RELATED ISSUES

Transferred Intent

The doctrine of transferred intent does not apply to general intent crimes such as assault. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1737 [34 Cal.Rptr.2d 723].)

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916. Assault by Conditional Threat

The defendant is charged [in Count ____] with assault committed by a conditional threat to use force.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully threatened to use force on another person unless that person immediately did an act that the defendant demanded;**
2. **The defendant intended to use force immediately to compel the other person to do the act;**
3. **The defendant had no right to demand that the other person do the act;**
4. **When the defendant made the threat, (he/she) had the present ability to use force on the other person;**

[AND]

5. **The defendant placed (himself/herself) in a position to compel performance of the act (he/she) demanded and took all steps necessary to carry out (his/her) intention(;/.)**

<Give element 6 when instructing on self-defense or defense of another>

[AND

6. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The term *use force* means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. It is enough if the touching makes contact with the person, including through his or her clothing. The touching need not cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

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No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements. *People v. McMakin* (1857) 8 Cal. 547, 548–549; *People v. McCoy* (1944) 25 Cal.2d 177, 192–193 [153 P.2d 315]; *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570 [21 Cal.Rptr.2d 445]; see also *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [20 Cal.Rptr.3d 857].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 45.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.11, 142.11A[1] (Matthew Bender).

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917. Insulting Words Are Not a Defense

Words, no matter how offensive, and acts that are not threatening, are not enough to justify an assault or battery.

[However, if you conclude that _____ <*insert name*> spoke or acted in a way that threatened _____ <*insert name of defendant or third party allegedly threatened*> with immediate harm [or an unlawful touching]/ [or] great bodily injury/ [or] trespass on land/ [or] trespass against goods], you may consider that evidence in deciding whether _____ <*insert name of defendant*> acted in (self-defense/ [or] defense of others).]

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. It is no defense to battery or assault that insulting or offensive words, or acts that fall short of a threat of immediate harm, were used. (*People v. Mayes* (1968) 262 Cal.App.2d 195, 197 [68 Cal.Rptr. 476]; *People v. Mueller* (1956) 147 Cal.App.2d 233, 239–240 [305 P.2d 178].)

If the evidence raises the issue of defense of self or others, give the bracketed paragraph along with any other appropriate defense instruction. (See *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303 [7 Cal.Rptr.3d 161]; see CALCRIM Nos. 3470–3477.)

AUTHORITY

- Instructional Requirements. See *People v. Davis* (1995) 10 Cal.4th 463, 542 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Mueller* (1956) 147 Cal.App.2d 233, 239–240 [305 P.2d 178].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 6.

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.11 (Matthew Bender).

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E. BATTERY

(i) Causing Injury

925. Battery Causing Serious Bodily Injury

The defendant is charged [in Count ____] with battery causing serious bodily injury.

To prove that the defendant is guilty of this charge, the People must prove that:

1. **The defendant willfully [and unlawfully] touched _____ <*insert name*> in a harmful or offensive manner;**

[AND]

2. **_____ <*insert name*> suffered serious bodily injury as a result of the force used(;/.)**

<Give element 3 when instructing on self-defense, defense of another, or reasonable discipline.>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else/ [or] while reasonably disciplining a child).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Making contact with another person, including through his or her clothing, is enough to commit a battery.

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[_____ <*Insert description of injury when appropriate; see Bench Notes*> is a serious bodily injury.]

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[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If there is sufficient evidence of reasonable parental discipline, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words "and unlawfully" in element 1, and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.

Give the final bracketed paragraph if indirect touching is an issue.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(d); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Burroughs* (1984) 35 Cal.3d 824, 831 [201 Cal.Rptr. 319, 678 P.2d 894] [serious bodily injury and great bodily injury are essentially equivalent elements], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

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- Defense of Parental Discipline. *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 39.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

Assault by means of force likely to produce great bodily injury is not a lesser included offense. (Pen. Code, § 245; *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1095 [92 Cal.Rptr.2d 228].)

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926. Battery Causing Injury to Specified Victim Not a Peace Officer

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The defendant is charged [in Count ____] with battery against (a/an) _____ <*insert title specified in Pen. Code, § 243(c)(1)*>.

To prove that the defendant is guilty of this charge, the People must prove that:

1. **The defendant willfully [and unlawfully] touched _____ <*insert name*> in a harmful or offensive manner;**

<*Alternative 2A—specified person performing duties*>

[2. When the defendant acted, _____ <*insert name*> was a _____ <*insert title specified in Pen. Code, §243(c)(1)*> and was performing the duties of (a/an) _____ <*insert title specified in Pen. Code, § 243(c)(1)*>;]

<*Alternative 2B—nurse or doctor*>

[2. When the defendant used that force, _____ <*insert name*> was a (nurse/medical doctor) who was giving emergency medical care outside of a hospital, clinic, or other health care facility;]

[AND]

3. **When the defendant acted, (he/she) knew or reasonably should have known, that _____ <*insert name*> was (a/an) _____ <*insert title specified in Pen. Code, § 243(c)(1)*> who was performing (his/her) duties(;/.)**

<*Give element 4 when the defendant is charged with Pen. Code, § 243(c)(1)*>

[AND]

4. **_____ <*insert name*> suffered injury as a result of the force used(;/.)]**

<*Give element 5 when instructing on self-defense or defense of another.*>

[AND

(4/5). The defendant did not act (in self-defense/ [or] in defense of someone else).]

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Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Making contact with another person, including through his or her clothing, is enough to commit a battery.

[The duties of (a/an) _____ <*insert title specified in Pen. Code, § 243(c)(1)*> **include** _____ <*insert appropriate list of job duties from statutory definition of professions, if available*>**.]**

[It does not matter whether _____ <*insert name*> **was actually on duty at the time.]**

[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. This instruction should be used when the alleged victim is not a peace officer. If the alleged victim is a peace officer, use CALCRIM No. 945, *Simple Battery Against Peace Officer.*

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the alleged victim is a doctor or nurse, give element 2B. Otherwise give element 2A.

If the defendant is charged under Penal Code section 243(c)(1), give bracketed element 4 and the definition of "injury." If the defendant is

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charged with misdemeanor battery under Penal Code section 243(b), do not give element 4 or the definition of "injury"

Give the appropriate list of job duties for the alleged victim's profession from the current Penal Code section, if one is provided. Emergency medical technician, nurse, custodial officer, lifeguard, traffic officer, and animal control officer are defined in Penal Code section 243(f). Firefighter is defined in Penal Code section 245.1. If a definition is provided in the statute, it should be given. (See *People v. Lara* (1994) 30 Cal.App.4th 658, 669 [35 Cal.Rptr.2d 886].)

Give the final bracketed paragraph if indirect touching is an issue.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(b)–(c)(1); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Injury Defined. Pen. Code, § 243(f)(6); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 20, 66, 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

COMMENTARY

People v. Longoria (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213], explains the meaning of injury as defined in the statute:

> It is the nature, extent, and seriousness of the injury—not the inclination or disinclination of the victim to seek medical treatment—which is determinative. A peace officer who obtains "medical treatment" when none is required, has not sustained an "injury" within the meaning of section 243, subdivision (c). And a peace officer who does not obtain "medical treatment" when such treatment is required, has sustained an "injury" within the meaning of section 243, subdivision (c). The test is objective and factual.

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LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault on Specified Victim. Pen. Code, § 241(b).
- Battery. Pen. Code, § 242.
- Misdemeanor Battery on Specified Victim. Pen. Code, § 243(b).
- Resisting Officer. Pen. Code, § 148.

(New January 2006)

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(ii) Sexual Battery

935. Sexual Battery: Felony

The defendant is charged [in Count ____] with sexual battery.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [or an accomplice] unlawfully restrained _____ <*insert name of complaining witness*>;**

<*Alternative 2A—defendant touched*>

[2. While _____ <*insert name of complaining witness*> was restrained, the defendant touched an intimate part of _____ <*insert name of complaining witness*>;]

<*Alternative 2B—caused complaining witness to touch*>

[2. While _____ <*insert name of complaining witness*> was restrained, the defendant (caused _____ <*insert name of complaining witness*> to touch (his/her) own intimate part/ [or] caused _____ <*insert name of complaining witness*> to touch the intimate part of defendant [or someone else]);]

3. **The touching was done against _____'s <*insert name of complaining witness*> will;**

AND

4. **The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.**

An *intimate part* is a female's breast or the anus, groin, sexual organ or buttocks of anyone.

Contact must have been made with _____'s <*insert name of complaining witness*> bare skin. This means that:

1. **The defendant must have touched the bare skin of _____'s <*insert name of complaining witness*> intimate part;**

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OR

2. _____'s <*insert name of complaining witness*> bare skin must have touched the defendant's [or _____'s <*insert name or description of third person*>] intimate part either directly or through (his/her) clothing.

Someone is *unlawfully restrained* when his or her liberty is controlled by words, acts, or authority of another and the restraint is against his or her will. Unlawful restraint requires more than just the physical force necessary to accomplish the sexual touching. [A person does not unlawfully restrain someone if he or she only uses lawful authority for a lawful purpose.]

[A touching is done *against a person's will* if that person does not consent to it. To *consent,* a person must act freely and voluntarily and know the nature of the touching.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give either alternative 2A or 2B depending on the evidence in the case. The committee has concluded that the direct touching requirement for felony sexual battery is satisfied when (1) the defendant forces the alleged victim to touch the defendant's intimate parts through the defendant's

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clothing with the alleged victim's bare skin; (2) the defendant forces the alleged victim to touch any part of the defendant with the victim's unclothed intimate part, whether the defendant's body is clothed or not; or (3) the defendant touches the alleged victim's bare intimate part either directly or through clothing. If a defendant is only charged under Penal Code section 243.4(a), the defendant must touch the victim's intimate part, not the other way around. (*People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].)

The committee omitted the word "masturbate" from the elements because the plain language of Penal Code section 243.4(d) requires only that the victim be compelled to touch him-or herself, and a further finding of whether that act of touching was actually masturbation is unnecessary.

Give the bracketed definition of "against a person's will" on request.

If the court gives the bracketed phrase "or an accomplice" in element 1, the court must also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.4(a) & (d).
- Intimate Part. Pen. Code, § 243.4(g)(1).
- Touches Defined. Pen. Code, § 243.4(f).
- Otherwise Lawful Restraint for Unlawful Purpose. *People v. Alford* (1991) 235 Cal.App.3d 799, 803–804 [286 Cal.Rptr. 762].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467] [discussing Pen. Code, § 289].
- Specific Intent Crime. *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Caused to Masturbate. *People v. Reeves* (2001) 91 Cal.App.4th 14, 50 [109 Cal.Rptr.2d 728].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322];

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People v. Stankewitz (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 26, 74–76.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Misdemeanor Sexual Battery. Pen. Code, § 243.4(e)(1).

COMMENTARY

In a case addressing the meaning of "for the purpose of . . . sexual abuse" in the context of Penal Code section 289, one court stated, "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes it this reasoning applies to the crime sexual battery and a party requests a definition of "sexual abuse," the following language can be used:

> *Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

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936. Sexual Battery on Institutionalized Victim

The defendant is charged [in Count ____] with sexual battery.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—defendant touched>

[1. While _____ <*insert name of complaining witness*> was institutionalized for medical treatment and was seriously disabled or medically incapacitated, the defendant touched an intimate part of _____ <*insert name of complaining witness*>;]

<Alternative 1B—caused complaining witness to touch>

[1. While _____ <*insert name of complaining witness*> was institutionalized for medical treatment and was seriously disabled or medically incapacitated, the defendant (caused _____ <*insert name of complaining witness*> to touch (his/her) own intimate part/ [or] caused _____ <*insert name of complaining witness*> to touch the intimate part of defendant [or someone else]);]

2. The touching was done against _____'s <*insert name of complaining witness*> will;

AND

3. The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

An *intimate part* is a female's breast or the anus, groin, sexual organ or buttocks of anyone.

Contact must have been made with _____'s <*insert name of complaining witness*> bare skin. This means that:

1. The defendant must have touched the bare skin of _____'s <*insert name of complaining witness*> intimate part;

OR

2. _____'s <*insert name of complaining witness*> bare skin must have touched the defendant's [or _____'s <*insert

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name or description of third person>] **intimate part either directly or through (his/her) clothing.**

[Someone is *institutionalized* if he or she is a patient in a hospital, medical treatment facility, nursing home, acute care facility, or mental hospital.]

[Someone is *seriously disabled* if he or she has severe physical or sensory disabilities.]

[Someone is *medically incapacitated* if he or she is incapacitated because of prescribed sedatives, anesthesia, or other medication.]

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give either alternative 2A or 2B depending on the evidence in the case. The committee has concluded that the direct touching requirement for felony sexual battery is satisfied when (1) the defendant forces the alleged victim to touch the defendant's intimate parts through the defendant's clothing with the alleged victim's bare skin; (2) the defendant forces the alleged victim to touch any part of the defendant with the victim's unclothed intimate part, whether the defendant's body is clothed or not; or (3) the defendant touches the alleged victim's bare intimate part either directly or through clothing. If a defendant is only charged under Penal Code section 243.4(a), the defendant must touch the victim's intimate part, not the other way around. (*People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].)

The committee omitted the word "masturbate" from the elements because the plain language of Penal Code section 243.4(d) requires only that the victim be compelled to touch him-or herself, and a further finding of whether that act of touching was actually masturbation is unnecessary.

Give the bracketed definition of "against a person's will" on request.

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AUTHORITY

- Elements. Pen. Code, §§ 242, 243.4(b) & (d).
- Institutionalized. Pen. Code, § 243.4(g)(5).
- Intimate Part. Pen. Code, § 243.4(g)(1).
- Medically Incapacitated. Pen. Code, § 243.4(g)(4).
- Seriously Disabled. Pen. Code, § 243.4(g)(3).
- Touches Defined. Pen. Code, § 243.4(f).
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].
- Specific Intent Crime. *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Misdemeanor Sexual Battery. Pen. Code, § 243.4(e)(1).

COMMENTARY

In a case addressing the meaning of "for the purpose of . . . sexual abuse" in the context of Penal Code section 289, one court stated, "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes it this reasoning applies to the crime sexual battery and a party requests a definition of "sexual abuse," the following language can be used:

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Sexual abuse means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

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937. Sexual Battery: By Fraudulent Representation

The defendant is charged [in Count ____] with sexual battery by fraudulent representation.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant touched an intimate part of _____'s** <*insert name of complaining witness*> **body;**
2. **The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse;**
3. **The defendant fraudulently represented that the touching served a professional purpose;**

AND

4. **The person touched was not conscious of the sexual nature of the act because of the fraudulent representation.**

An *intimate part* is a female's breast or the anus, groin, sexual organ or buttocks of anyone.

Contact must have been made with _____'s <*insert name of complaining witness*> **bare skin. This means that the defendant must have touched the bare skin of _____'s** <*insert name of complaining witness*> **intimate part either directly or though the defendant's clothing.**

A person is *not conscious of the sexual nature of the act* if he or she is not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the touching served a professional purpose when it did not.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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AUTHORITY

- Elements. Pen. Code, §§ 242, 243.4(c).
- Intimate Part Defined. Pen. Code, § 243.4(g)(1).
- Touches Defined. Pen. Code, § 243.4(f).
- Unconscious of Nature of Act Defined. See Pen. Code, § 261(a)(4)(D) [in context of rape].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 74.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Misdemeanor Sexual Battery. Pen. Code, § 243.4(e)(1).

COMMENTARY

In a case addressing the meaning of for the "purpose of . . . sexual abuse" in the context of Penal Code section 289, one court stated, "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes it this reasoning applies to the crime sexual battery and a party requests a definition of "sexual abuse," the following language can be used:

> *Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

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RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may induce someone else to consent to engage in a sexual act by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567].)

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938. Sexual Battery: Misdemeanor

The defendant is charged [in Count ____] with sexual battery.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant touched an intimate part of _____ <*insert name of complaining witness*>;**
2. **The touching was done against _____'s <*insert name of complaining witness*> will;**

AND

3. **The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.**

An *intimate part* is a female's breast or the anus, groin, sexual organ, or buttocks of anyone.

***Touching*, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing.**

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed definition of "against a person's will" on request.

AUTHORITY

- Elements. Pen. Code, § 243.4(e)(1).
- Touches Defined. Pen. Code, § 243.4(e)(2).
- Intimate Part Defined. Pen. Code, § 243.4(g)(1).

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- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Specific-Intent Crime. *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Defendant Must Touch Intimate Part of Victim. *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].
- Defendant Need Not Touch Skin. *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[2] (Matthew Bender).

COMMENTARY

In a case addressing the meaning of for the "purpose of . . . sexual abuse" in the context of Penal Code section 289, one court has stated that "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes that this reasoning applies to the crime of sexual battery and a party requests a definition of "sexual abuse," the following language may be used:

> *Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

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(iii) On Specified Person or in Specified Location

945. Simple Battery Against Peace Officer

The defendant is charged [in Count ____] with battery against a peace officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*Insert officer's name, excluding title*> **was a peace officer performing the duties of (a/an)** _____ <*insert title of peace officer specified in Pen. Code, § 830 et seq.*>**;**
2. **The defendant willfully [and unlawfully] touched** _____ <*insert officer's name, excluding title*> **in a harmful or offensive manner;**

[AND]

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that** _____ <*insert officer's name, excluding title*> **was a peace officer who was performing (his/her) duties(;/.)**

<*Give element 4 when instructing on self-defense or defense of another.*>

[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

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[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> is a *peace officer* if _____ <*insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer"*>.]

[The duties of a _____ <*insert title of officer*> include _____ <*insert job duties*>.]

[It does not matter whether _____ <*insert officer's name, excluding title*> was actually on duty at the time.]

[A _____ <*insert title of peace officer specified in Pen. Code, § 830 et seq.*> is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as a part-time or casual private security guard or (patrolman/patrolwoman).]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give the bracketed paragraph on indirect touching if that is an issue.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title* . . .> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Give the bracketed language about a peace officer working in a private capacity if relevant. (Pen. Code, § 70.)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(b), (c)(2); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].

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- Peace Officer Defined. Pen. Code, § 830 et seq.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault on Specified Victim. Pen. Code, § 241(b).
- Battery. Pen. Code, § 242.
- Misdemeanor Battery on Specified Victim. Pen. Code, § 243(b).
- Resisting Officer. Pen. Code, § 148.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and 2670, *Lawful Performance: Peace Officer*.

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946. Battery Against Custodial Officer

The defendant is charged [in Count ____] with battery against a custodial officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*Insert officer's name, excluding title*> **was a custodial officer performing the duties of a custodial officer;**
2. **The defendant willfully [and unlawfully] touched** _____ <*insert officer's name, excluding title*> **in a harmful or offensive manner;**

[AND]

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that** _____ <*insert officer's name, excluding title*> **was a custodial officer who was performing (his/her) duties(;/.)**

<*Give element 4 when instructing on self-defense or defense of another.*>

[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A

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(county jail/city jail/_____ <*insert description*>) is a local detention facility.] [A custodial officer is not a peace officer.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer.*

Give the bracketed paragraph on indirect touching if that is an issue.

The jury must determine whether the alleged victim is a custodial officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135] [discussing definition of "peace officer"].) The court may instruct the jury on the appropriate definition of "custodial officer" from the statute. *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a custodial officer as a matter of. *(Ibid.)*

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If there is a dispute about whether the site of an alleged crime is a local detention facility, see Penal Code section 6031.4.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.1; see *In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1221 [57 Cal.Rptr.2d 851] [section 243.1 applies only to batteries committed against custodial officers in adult penal institutions]; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Custodial Officer Defined. Pen. Code, § 831.
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Statute Constitutional. *People v. Wilkinson* (2004) 33 Cal.4th 821, 840–841 [16 Cal.Rptr.3d 420, 94 P.3d 551].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery on Person Not Confined. Pen. Code, § 4131.5.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

(New January 2006)

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947. Simple Battery on Military Personnel

The defendant is charged [in Count ____] with battery against a member of the United States Armed Forces.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully [and unlawfully] touched _____ <*insert name of complaining witness*> in a harmful or offensive manner;**
2. **_____ <*insert name of complaining witness*> was a member of the United States Armed Forces at the time of the touching;**

[AND]

3. **The defendant knew _____ <*insert name of complaining witness*> was a member of the United States Armed Forces and touched _____ <*insert name of complaining witness*> in a harmful or offensive manner because of _____ <*insert name of complaining witness*>'s service(;/.)**

<Give element 4 when instructing on self-defense or defense of another.>

[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

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A _____ <*insert description, e.g., "private in the United States Army"*> is a member of the United States Armed Forces.

A person commits a battery *because of* someone's service in the armed forces if:

1. **He or she is biased against the person battered based on that person's military service;**

AND

2. **That bias caused him or her to commit the alleged battery.**

If the defendant had more than one reason to commit the alleged battery, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the battery.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if that is an issue.

The jury must determine whether the alleged victim is a member of the armed forces. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "member of the armed forces." However, the court may not instruct the jury that the alleged victim was a member of the armed forces as a matter of law. *(Ibid.)*

AUTHORITY

- Elements. Pen. Code, § 243.10.

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- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 19.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, §§ 242, 243(a).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 960, *Simple Battery*.

(New January 2006)

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948. Battery Against Transportation Personnel or Passenger

The defendant is charged [in Count ____] with battery against (a/an) (operator/driver/passenger/station agent/ticket agent) of (a/an) _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 243.3*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*Insert name*> **was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an)** _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 243.3*>**;**
2. **The defendant willfully [and unlawfully] touched** _____ <*insert name*> **in a harmful or offensive manner;**

<*Give element 3 when alleged victim is an operator, driver, station agent, or ticket agent.*>

[3. When the defendant acted, _____ <*insert name*> **was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent) of (a/an)** _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 243.3*>**;]**

[AND]

4. **When the defendant acted, (he/she) knew, or reasonably should have known, that** _____ <*insert name*> **was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an)** _____ <*insert name of vehicle or transportation entity specified in Pen. Code, § 243.3*> **[and that** _____ <*insert name*> **was performing (his/her) duties](;/)**

<*Give element 5 when the defendant is charged with felony battery based on injury.*>

[AND]

[5. _____ <*insert name*> **suffered an injury as a result of the force used(;/.)]**

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<Give element 6 when instructing on self-defense or defense of another.>

[AND

6. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Making contact with another person, including through his or her clothing, is enough to commit a battery. [The slightest touching can be enough if it is done in a rude or angry way.] [The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the alleged victim was an operator, driver, station agent, or ticket agent of a statutorily specified vehicle or transportation entity, give bracketed element 3 and the bracketed language in element 4. If the alleged victim

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was a passenger, omit bracketed element 3 and the bracketed language in element 4.

Give bracketed element 5 and the bracketed definition of "injury" if the defendant is charged with felony battery based on an injury to the alleged victim. (See Pen. Code, § 243.3.)

Give the final bracketed paragraph if indirect touching is an issue.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.3; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Injury Defined. Pen. Code, § 243(f)(6); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 20, 72, pp. 645–647, 650–651, 689.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

If the defendant is charged with felony battery on transportation personnel or passenger based on an injury to the alleged victim, then the misdemeanor battery on the specified victim is a lesser included offense. (See Pen. Code, § 243.3.)

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RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery*.

(New January 2006)

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949. Battery Against School Employee

The defendant is charged [in Count ____] with battery against a school employee.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*Insert name*> **was a school employee;**
2. **The defendant willfully [and unlawfully] touched** _____ <*insert name*> **in a harmful or offensive manner;**

<*Alternative 3A—performing duties*>

[3. When the defendant acted, _____ <*insert name*> **was performing (his/her) duties as a school employee;]**

<*Alternative 3B—retaliation*>

[3. When the defendant acted, (he/she) was retaliating against _____ <*insert name*> **because of something** _____ <*insert name*> **had done while performing (his/her) duties as a school employee;]**

[AND]

4. **When the defendant acted, (he/she) knew, or reasonably should have known, that** _____ <*insert name*> **was a school employee(;/.)**

<*Give element 5 when the defendant is charged with felony battery based on injury.*>

[AND]

[5. _____ <*insert name*> **suffered injury as a result of the force used(;.)]**

<*Give element 6 when instructing on self-defense or defense of another.*>

[AND

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The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Making contact with another person, including through his or her clothing, is enough to commit a battery. [The slightest touching can be enough if it is done in a rude or angry way.] [The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[It is not a defense that the touching occurred off campus or outside regular school hours.]

A *school employee* is any person employed as a permanent or probationary certificated or classified employee of a school district on a part-time or full-time basis, including a substitute teacher, student teacher, or school board member.

[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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Give alternative 3A or 3B, depending on whether there is evidence that the defendant used force while the employee was performing job duties or used force in retaliation for something the employee previously did while performing job duties. (See Pen. Code, § 243.6.)

Give element 5 and the bracketed definition of "injury" if the defendant is charged with a felony based on an injury to the alleged victim. (See Pen. Code, § 243.6.)

Give the bracketed paragraph on touching if indirect touching is an issue.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.6; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Injury Defined. Pen. Code, § 243(f)(6); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].
- School Employee Defined. Pen. Code, § 245.5(d).
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 73.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

If the defendant is charged with felony battery on a school employee based on an injury to the alleged victim, then the misdemeanor battery on the specified victim is a lesser included offense. (See Pen. Code, § 243.6.)

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RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery*.

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950. Battery Against a Juror

The defendant is charged [in Count ____] with battery against a juror.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a party to a case for which a jury had been selected;**
2. **_____ <*insert name*> had been sworn as a juror [or alternate juror] to decide that case;**

[AND]

3. **The defendant willfully [and unlawfully] touched _____ <*insert name*> in a harmful or offensive manner(;/.)**

<Give element 4 when instructing on self-defense or defense of another.>

[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The touching may have taken place either while the case was pending or after it was concluded.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4, the bracketed words "and unlawfully" in element 3, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the final bracketed paragraph on touching if indirect touching is an issue.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.7; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

COMMENTARY

Unlike other statutes penalizing battery on a particular person, Penal Code section 243.7 does not state that the defendant must have known that the

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person assaulted was a juror. Thus, the committee has not included knowledge among the elements.

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951. Battery Committed on School, Park, or Hospital Property

The defendant is charged [in Count ____] with battery against a person on (school property/park property/hospital grounds).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully [and unlawfully] touched _____ <*insert name*> in a harmful or offensive manner;**

[AND]

2. **When the defendant acted, (he/she) was on (school property/park property/the grounds of a hospital)(;/.)**

<Give element 3 when instructing on self-defense, defense of another, of reasonable discipline>

[AND

3. **The defendant did not act (in self-defense[,]/ [or] in defense of someone else[,]/ [or] while reasonably disciplining a child).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[A *school* is any (elementary school/junior high school/four-year high school/senior high school/adult school [or any branch thereof]/opportunity school/continuation high school/regional occupational center/evening high school/technical school/ community college).]

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[A *park* is any publicly maintained or operated park. It does not include any facility that is being used for professional sports or commercial events.]

[A *hospital* is any facility for the diagnosis, care, and treatment of human illness that is (licensed/specifically exempt from licensing) under state law.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if that is an issue. Give any of the bracketed definitions on request depending on the facts in the case.

Related Instructions

CALCRIM No. 960, *Simple Battery*.

CALCRIM No. 906, *Assault Committed on School or Park Property*.

AUTHORITY

- Elements. Pen. Code, §§ 240, 243.2.
- Willful Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 22, 23.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

RELATED ISSUES

Touching of Something Attached to or Closely Connected with Person

The committee could not locate any authority on whether it is sufficient to commit a battery if the defendant touches something attached to or closely connected with the person. Thus, the committee has not included this principle in the instruction.

Labor Dispute

Penal Code section 243.2 does not apply to conduct arising during the course of an otherwise lawful labor dispute. (Pen. Code, § 243.2(c).)

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(iv) Simple Battery

960. Simple Battery

The defendant is charged with battery.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully [and unlawfully] touched _____ <*insert name*> in a harmful or offensive manner(;/.)**

<Give element 2 when instructing on self-defense, defense of another, or reasonable discipline.>

[AND

2. **The defendant did not act (in self-defense/ [or] in defense of someone else/ [or] while reasonably disciplining a child).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[It is no defense to this crime that the defendant was responding to a provocative act that was not a threat or an attempt to inflict physical injury.] [Words alone, no matter how offensive or exasperating, are not an excuse for this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If there is sufficient evidence of reasonable parental discipline, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words "and unlawfully" in element 1, and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give the bracketed paragraph on indirect touching if that is an issue.

AUTHORITY

- Elements. Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Defense of Parental Discipline. *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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RELATED ISSUES

Touching of Something Attached to or Closely Connected with Person

The committee could not locate any authority on whether it is sufficient to commit a battery if the defendant touches something attached to or closely connected with the person. Thus, the committee has not included this principle in the instruction.

Battery Against Elder or Dependent Adult

When a battery is committed against an elder or dependent adult as defined in Penal Code section 368, with knowledge that the victim is an elder or a dependent adult, special punishments apply. (Pen. Code, § 243.25.)

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F. SHOOTING AND BRANDISHING

(i) Shooting

965. Shooting at Inhabited House or Occupied Motor Vehicle

The defendant is charged [in Count ____] with shooting at an (inhabited house/inhabited house car/inhabited camper/occupied building/occupied motor vehicle/occupied aircraft).

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully and maliciously shot a firearm;

[AND]

2. The defendant shot the firearm at an (inhabited house/ inhabited house car/inhabited camper/occupied building/ occupied motor vehicle/occupied aircraft)(;/.)

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

[A (house/house car/camper) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged shooting.]

[A (house/house car/camper) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

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[A (house/house car/camper) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A house includes any (structure/garage/office/_____ <*insert other structure*>) that is attached to the house and functionally connected with it.]

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[A *house car* is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached.]

[A *camper* is a structure designed to be mounted upon a motor vehicle and to provide facilities for human habitation or camping purposes.]

[An *aircraft* is an airplane or other craft intended for and capable of transporting persons through the air.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*firearm*/_____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

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Related Instructions

CALCRIM No. 966, *Shooting at Uninhabited House or Unoccupied Motor Vehicle*.

CALCRIM No. 967, *Shooting at Unoccupied Aircraft*.

AUTHORITY

- Elements. Pen. Code, § 246.
- Aircraft Defined. Pen. Code, § 247.
- Camper Defined. Veh. Code, § 243.
- Firearm Defined. Pen. Code, § 12001(b).
- House Car Defined. Veh. Code, § 362.
- Malicious Defined. Pen. Code, § 7(4); *People v. Watie* (2002) 100 Cal.App.4th 866, 879 [124 Cal.Rptr.2d 258].
- Motor Vehicle Defined. Veh. Code, § 415.
- Willful Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155].
- General Intent Crime. *People v. Jischke* (1996) 51 Cal.App.4th 552, 556 [59 Cal.Rptr.2d 269]; *People v. Cruz* (1995) 38 Cal.App.4th 427, 431–433 [45 Cal.Rptr.2d 148] [intent to strike building not required].
- Occupied Building. *People v. Adams* (1982) 137 Cal.App.3d 346, 354–355 [187 Cal.Rptr. 505] [attached garage].
- Occupied Motor Vehicle. *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1638 [273 Cal.Rptr. 397] [tractor/trailer rig being operated on a road].
- House Not Inhabited Means Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 49.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2], [4] (Matthew Bender).

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LESSER INCLUDED OFFENSES

Assault with a deadly weapon (Pen. Code, § 245) is not necessarily included in the offense of discharging a firearm at an occupied vehicle. (*In re Daniel R.* (1993) 20 Cal.App.4th 239, 244, 247 [24 Cal.Rptr.2d 414].)

Grossly negligent discharge of a firearm pursuant to Penal Code section 246.3 is a lesser included offense of discharging a firearm at an occupied building. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1360 [24 Cal.Rptr.3d 798].)

RELATED ISSUES

Concurrent Sentence for Firearm Possession

If a prior felon arrives at the scene already in possession of a firearm and then shoots at an inhabited dwelling, Penal Code section 654 does not preclude imposing sentences for both offenses. (*People v. Jones* (2002) 103 Cal.App.4th 1139 [127 Cal.Rptr.2d 319].)

Shooting Weapon Inside Dwelling

"[T]he firing of a pistol within a dwelling house does not constitute a violation of Penal Code section 246." (*People v. Stepney* (1981) 120 Cal.App.3d 1016, 1021 [175 Cal.Rptr. 102] [shooting television inside dwelling].) However, shooting from "inside [an] apartment . . . in the direction of the apartment below" is a violation of section 246. (*People v. Jischke* (1996) 51 Cal.App.4th 552, 556 [59 Cal.Rptr.2d 269].)

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966. Shooting at Uninhabited House or Unoccupied Motor Vehicle

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The defendant is charged [in Count ____] with shooting at an (uninhabited house[,]/ [or] uninhabited building[,]/ [or] unoccupied motor vehicle).

To prove that the defendant is guilty of this crime, the People must prove that:

[1.] The defendant willfully shot a firearm at an (uninhabited house[,]/ [or] uninhabited building[,]/ [or] unoccupied motor vehicle)(;/.)

<Give element 2 when consent of the owner is an issue; see Bench Notes>

[AND]

[2. The defendant did the shooting without the owner's permission(;/.)]

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A house includes any (structure/garage/office/_____ *<insert other structure>*) **that is attached to the house and functionally connected with it.]**

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ *<insert other type of motor vehicle>*).]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

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[The term[s] (*firearm/*_____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Consent of the owner of the vehicle or building is an affirmative defense. (Pen. Code, § 247(b); *People v. Lam* (2004) 122 Cal.App.4th 1297, 1301 [19 Cal.Rptr.3d 431].) If there is sufficient evidence of consent, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Related Instructions

CALCRIM No. 965, *Shooting at Inhabited House or Occupied Motor Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 247(b).
- Firearm Defined. Pen. Code, § 12001(b).
- Motor Vehicle Defined. Veh. Code, § 415.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 49.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][i] (Matthew Bender).

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967. Shooting at Unoccupied Aircraft

The defendant is charged [in Count ____] with shooting at an unoccupied aircraft.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously shot a firearm;**

[AND]

2. **The defendant shot the firearm at an unoccupied aircraft(;/.)**

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

[An *aircraft* is an airplane or other craft intended for and capable of transporting persons through the air.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*firearm/*_____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Related Instructions

CALCRIM No. 965, *Shooting at Inhabited House or Occupied Motor Vehicle*.

CALCRIM No. 966, *Shooting at Uninhabited House or Unoccupied Motor Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 247(a).
- Firearm Defined. Pen. Code, § 12001(b).
- Malicious Defined. Pen. Code, § 7(4).
- Aircraft Defined. Pen. Code, § 247.
- Willful Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155] [in context of Pen. Code, § 246].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 51.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][i] (Matthew Bender).

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RELATED ISSUES

Laser

Willfully and maliciously discharging a laser at an occupied aircraft that is in motion or flight is a separate crime. (See Pen. Code, § 247.5.) It is also a crime to willfully shine a light or other bright device at an aircraft with the intent to interfere with the aircraft's operation. (See Pen. Code, § 248.)

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968. Shooting From Motor Vehicle

The defendant is charged [in Count ____] with shooting from a motor vehicle [at another person].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously shot a firearm from a motor vehicle(;/.)**

<Give element 2 when defendant charged with Pen. Code, § 12034(c)>

[AND]

[2. The defendant shot the firearm at another person who was not in a motor vehicle(;/.)]

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*firearm*/_____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed phrase "at another person" in the first sentence plus bracketed element 2 if the defendant is charged with shooting at someone who was not in a motor vehicle. (See Pen. Code, § 12034(c).) If the defendant is only charged with shooting from a motor vehicle (see Pen. Code, § 12034(d)), give element 1 but not element 2.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Related Instructions

CALCRIM No. 969, *Permitting Someone to Shoot From Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 12034(c) & (d).
- Firearm Defined. Pen. Code, § 12001(b).
- Malicious Defined. Pen. Code, § 7(4).
- Willful Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155] [in context of Pen. Code, § 246].
- General Intent Crime. *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 [61 Cal.Rptr.2d 680] [dictum].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 50.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2], [4] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Assault with a Firearm. Pen. Code, § 245(a)(2); *In re Edward G.* (2004) 124 Cal.App.4th 962, 971 [21 Cal.Rptr.3d 786].

RELATED ISSUES

Shooting at Animal

It is a separate crime to shoot from a motor vehicle at any game bird or mammal. (See Fish & G. Code, § 3002.)

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969. Permitting Someone to Shoot From Vehicle

The defendant is charged [in Count ____] with permitting someone to shoot from a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was the (driver/ [or] owner) of a vehicle;**
2. **The defendant permitted someone to shoot a firearm from the vehicle;**
3. **The defendant knew that (he/she) was permitting someone to shoot a firearm from the vehicle;**

AND

4. **The other person shot the firearm from the vehicle.**

[A vehicle owner who permits someone else to shoot a firearm from the vehicle is guilty even if the owner is not in the vehicle when the shooting happens.]

[A *vehicle* is a device by which people or things may be moved on a road or highway. A vehicle does not include a device that is moved only by human power or used only on stationary rails or tracks.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*firearm/*_____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

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Related Instructions

CALCRIM No. 968, *Shooting From Motor Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 12034(b).
- Firearm Defined. Pen. Code, § 12001(b).
- General Intent Crime. *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 [61 Cal.Rptr.2d 680].
- Vehicle Defined. Veh. Code, § 670.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 50.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2] (Matthew Bender).

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970. Shooting Firearm in Grossly Negligent Manner

The defendant is charged [in Count ____] with shooting a firearm in a grossly negligent manner.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant intentionally shot a firearm;**
2. **The defendant did the shooting with gross negligence;**

[AND]

3. **The shooting could have resulted in the injury or death of a person(;/.)**

<Give element 4 when instructing on self-defense or defense of another>

[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Gross negligence **involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:**

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury.**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

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[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*great bodily injury*/ [and] *firearm*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

AUTHORITY

- Elements. Pen. Code, § 246.3.
- Discharge Must be Intentional. *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155]; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 [16 Cal.Rptr.2d 656].
- Firearm Defined. Pen. Code, § 12001(b).
- Willful Defined. Pen. Code, § 7(1).
- Gross Negligence Defined. *People v. Alonzo* (1993) 13 Cal.App.4th 535, 540 [16 Cal.Rptr.2d 656]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].
- Actual Belief Weapon Not Loaded Negates Mental State. *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [35 Cal.Rptr.2d 155].

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 48.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][i] (Matthew Bender).

LESSER INCLUDED OFFENSES

Unlawful possession by a minor of a firearm capable of being concealed on the person (see Pen. Code, § 12101(a)) is not a necessarily included offense of unlawfully discharging a firearm with gross negligence. (*In re Giovani M.* (2000) 81 Cal.App.4th 1061, 1066 [97 Cal.Rptr.2d 319].)

RELATED ISSUES

Second Degree Felony-Murder

Grossly negligent discharged of a firearm is an inherently dangerous felony and may serve as the predicate offense to second degree felony-murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 173 [17 Cal.Rptr.3d 604, 95 P.3d 872] [merger doctrine does not apply]; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 [92 Cal.Rptr.2d 727]; see CALCRIM Nos. 541A–541C, *Felony Murder: Second Degree*.)

Actual Belief Weapon Not Loaded Negates Mental State

"A defendant who believed that the firearm he or she discharged was unloaded . . . would not be guilty of a violation of section 246.3." (*People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872] [citing *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [35 Cal.Rptr.2d 155]].)

(New January 2006)

971–979. Reserved for Future Use

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(ii) Brandishing

980. Brandishing Firearm in Presence of Occupant of Motor Vehicle

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The defendant is charged [in Count ____] with brandishing a firearm in the presence of someone in a motor vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drew or exhibited a firearm in the presence of another person who was in a motor vehicle that was being driven on a public street or highway;**

[AND]

2. **The defendant drew or exhibited the firearm against the other person in a threatening manner that would cause a reasonable person to fear bodily harm(;/.)**

<Give element 3 when instructing on self-defense or defense of another>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[A motor vehicle is *proceeding* on a public street or highway if it is moving on a street or highway with its engine running and propelling the vehicle.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*firearm*/_____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

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[It is not required that the firearm be loaded.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded on request. (See Pen. Code, § 417.3.)

Related Instructions

For misdemeanor brandishing instructions, see CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor.*

AUTHORITY

- Elements. Pen. Code, § 417.3; *People v. Lara* (1996) 43 Cal.App.4th 1560, 1565–1566 [51 Cal.Rptr.2d 349] [brandishing must be directed against occupant of vehicle].
- Firearm Defined. Pen. Code, § 12001(b).
- Motor Vehicle Defined. Veh. Code, §§ 415, 670.
- Proceeding Defined. *People v. Howard* (2002) 100 Cal.App.4th 94, 97 [121 Cal.Rptr.2d 892].
- Victim's Awareness of Firearm Not a Required Element. *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891] [in context of misdemeanor brandishing under Pen. Code, § 417(a)].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Brandishing a Firearm. Pen. Code, § 417.3; *People v. Howard* (2002) 100 Cal.App.4th 94, 99 [121 Cal.Rptr.2d 892].

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981. Brandishing Firearm in Presence of Peace Officer

The defendant is charged [in Count ____] with brandishing a firearm in the presence of a peace officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drew or exhibited a firearm in the immediate presence of a peace officer;**
2. **The defendant drew or exhibited the firearm in a rude, angry, or threatening manner;**
3. **When the defendant acted, the officer was lawfully performing (his/her) duties;**

[AND]

4. **When the defendant acted, (he/she) knew, or reasonably should have known, from the person's uniform or other identifying action[s] that the person was a peace officer who was performing (his/her) duties(;/.)**

<Give element 5 when instructing on self-defense or defense of another>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction to which you should refer.]

[It is not required that the firearm be loaded.]

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> is

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a *peace officer* if _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

[The duties of a _____ <*insert title of officer*> **include** _____ <*insert job duties*>**.]**

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer.*

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Give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded on request.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Related Instructions

For misdemeanor brandishing instructions, see CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor.*

AUTHORITY

- Elements. Pen. Code, § 417(c) & (e).
- Firearm Defined. Pen. Code, § 12001(b); see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a "firearm" within meaning of Pen. Code, § 417(a)].
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Victim's Awareness of Firearm Not a Required Element. *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891] [in context of misdemeanor brandishing under Pen. Code, § 417(a)].
- Weapon Need Not Be Pointed Directly at Victim. *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420] [in context of Pen. Code, § 417(a)].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Brandishing a Firearm. Pen. Code, § 417(a)(2).

RELATED ISSUES

Infliction of Serious Bodily Injury

It is a separate offense to intentionally inflict serious bodily injury while drawing or exhibiting a firearm in the presence of a peace officer. (See Pen. Code, § 417.6(a); see also Pen. Code, § 417.6(b) [defining "serious bodily injury"].)

Multiple Peace Officers

A "single act of exhibiting a firearm in the presence of a peace officer . . . cannot be punished as many times as there are peace officers observing the act. . . . [T]he multiple-victim exception [under *Neal v. State of California* (1960) 55 Cal.2d 11, 20–21 [9 Cal.Rptr. 607, 357 P.2d 839] for acts of violence against multiple victims] is just that, a multiple-victim exception, not a multiple-observer exception." (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1095–1096 [100 Cal.Rptr.2d 279].)

Reasonable Person Standard for Physically Disabled Defendant

A defendant with a physical disability is entitled to an instruction that the reasonable person standard as used in this instruction means a person with the same physical disability. (*People v. Mathews* (1994) 25 Cal.App.4th 89, 99 [30 Cal.Rptr.2d 330]; see CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.)

(New January 2006)

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982. Brandishing Firearm or Deadly Weapon to Resist Arrest

The defendant is charged [in Count ____] with brandishing a (firearm/deadly weapon) to resist arrest or detention.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drew or exhibited a (firearm/deadly weapon);**

AND

2. **When the defendant drew or exhibited the (firearm/deadly weapon), (he/she) intended to resist arrest or to prevent a peace officer from arresting or detaining (him/her/someone else).**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term[s] (*firearm*[,]/ *deadly weapon*[,]/ [and] *great bodily injury*) (is/are) defined in another instruction to which you should refer.]

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> is a *peace officer* if _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded on request.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

Related Instructions

CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor.*

CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer.*

CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer.*

AUTHORITY

- Elements. Pen. Code, § 417.8.
- Firearm Defined. Pen. Code, § 12001(b); see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a "firearm" within meaning of Pen. Code, § 417(a)].
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204] [hands and feet not

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deadly weapons]; see, e.g., *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [50 Cal.Rptr.2d 351] [screwdriver was capable of being used as a deadly weapon and defendant intended to use it as one if need be]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 469–470 [90 Cal.Rptr.2d 450] [pit bulls were deadly weapons under the circumstances].

- Lawful Performance of Duties Not an Element. *People v. Simons* (1996) 42 Cal.App.4th 1100, 1109–1110 [50 Cal.Rptr.2d 351].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

Resisting arrest by a peace officer engaged in the performance of his or her duties in violation of Penal Code section 148(a) is not a lesser included offense of Penal Code section 417.8. (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108–1110 [50 Cal.Rptr.2d 351].) Brandishing a deadly weapon in a rude, angry, or threatening manner in violation of Penal Code section 417(a)(1) is also not a lesser included offense of section 417.8. (*People v. Pruett* (1997) 57 Cal.App.4th 77, 88 [66 Cal.Rptr.2d 750].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.

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983. Brandishing Firearm or Deadly Weapon: Misdemeanor

The defendant is charged [in Count ____] with brandishing a (firearm/deadly weapon).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drew or exhibited a (firearm/deadly weapon) in the immediate presence of someone else;**

[AND]

<Alternative 2A—displayed in rude, angry, or threatening manner>

[2. The defendant did so in a rude, angry, or threatening manner(;/.)]

<Alternative 2B—used in fight>

[2. The defendant [unlawfully] used the (firearm/deadly weapon) in a fight or quarrel(;/.)]

<Give element 3 when instructing on self-defense or defense of another.>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term[s] (*firearm[,]/ deadly weapon[,]/* [and] *great bodily injury*) (is/are) defined in another instruction to which you should refer.]

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[It is not required that the firearm be loaded.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the prosecution alleges that the defendant displayed the weapon in a rude, angry, or threatening manner, give alternative 2A. If the prosecution alleges that the defendant used the weapon in a fight, give alternative 2B.

If the defendant is charged under Penal Code section 417(a)(2)(A), the court **must** also give CALCRIM No. 984, *Brandishing Firearm: Misdemeanor—Public Place*.

Give the bracketed definition of "firearm" or "deadly weapon" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, give the bracketed sentence stating that the firearm need not be loaded.

AUTHORITY

- Elements. Pen. Code, § 417(a)(1) & (2).
- Firearm Defined. Pen. Code, § 12001(b).
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Victim's Awareness of Firearm Not a Required Element. *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891].
- Weapon Need Not Be Pointed Directly at Victim. *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][e] (Matthew Bender).

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984. Brandishing Firearm: Misdemeanor—Public Place

If you find the defendant guilty of brandishing a firearm, you must then decide whether the People have proved the additional allegation that the defendant brandished a firearm that was capable of being concealed on the person while in a public place.

To prove this allegation, the People must prove that:

1. **The defendant drew or exhibited a firearm that was capable of being concealed on the person;**

AND

2. **When the defendant did so, (he/she) was (in a public place in an incorporated city/ [or] on a public street).**

A firearm *capable of being concealed on the person* is a firearm that has a barrel less than 16 inches in length. [A firearm *capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.]

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged under Penal Code section 417(a)(2)(A), the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor.*

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved this allegation.

Penal Code section 417(a)(2)(A) applies to a firearm that "is a pistol, revolver, or other firearm capable of being concealed upon the person."

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Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

AUTHORITY

- Elements. Pen. Code, § 417(a)(2)(A).
- Firearm Capable of Being Concealed Defined. Pen. Code, § 12001(a)(1).
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][d], [e] (Matthew Bender).

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985. Brandishing Imitation Firearm

The defendant is charged [in Count ____] with brandishing an imitation firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drew or exhibited an imitation firearm in a threatening manner against another person;**
2. **The defendant's act caused someone to fear bodily harm to himself or herself or someone else;**

[AND]

3. **That fear of harm was reasonable(;/.)**

<Give element 4 when instructing on self-defense or defense of another.>

[AND

4. **When the defendant drew or exhibited the imitation firearm, (he/she) was not acting (in self-defense/ [or] in defense of someone else).]**

An *imitation firearm* is a device[, or a toy gun, replica of a firearm, or BB device,] that is so substantially similar to a real firearm in color and overall appearance that a reasonable person would believe that it is a real firearm. [A *BB device* is an instrument that expels a projectile, such as a BB or other pellet, not exceeding 6 mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed

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element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

AUTHORITY

- Elements. Pen. Code, § 417.4.
- Imitation Firearm. Pen. Code, § 12550.
- BB Device Defined. Pen. Code, § 12001.
- Reasonable Person Must Be Placed in Fear. *In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].
- Person Placed in Fear May Be Bystander. *In re Michael D.* (2002) 100 Cal.App.4th 115, 120–123 [121 Cal.Rptr.2d 909].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][e] (Matthew Bender).

RELATED ISSUES

Reasonable Person Who Fears Harm May Be Bystander

Penal Code section 417.4 requires not "only the presence of another person against whom the imitation firearm is displayed or exhibited, but also some person's knowledge of, and a reaction to, the perpetrator's action." (*In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].) Thus, someone must be placed in fear as a result of the defendant's conduct; however, this does not have to be the person against whom the object is exhibited. (*Id.* at pp. 120–123.) The term "reasonable person," as used in the statute "refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited." (*Id.* at p. 123.)

(New January 2006)

986–999. Reserved for Future Use

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SEX OFFENSES

A. AGAINST ADULT OR MINOR

(i) Rape

1000. Rape or Spousal Rape by Force, Fear, or Threats
1001. Rape or Spousal Rape in Concert
1002. Rape of Intoxicated Woman or Spouse
1003. Rape of Unconscious Woman or Spouse
1004. Rape of a Disabled Woman
1005. Rape by Fraud
1006–1014. Reserved for Future Use

(ii) Oral Copulation

1015. Oral Copulation by Force, Fear, or Threats
1016. Oral Copulation in Concert
1017. Oral Copulation of an Intoxicated Person
1018. Oral Copulation of an Unconscious Person
1019. Oral Copulation of a Disabled Person
1020. Oral Copulation of a Disabled Person in a Mental Hospital
1021. Oral Copulation by Fraud
1022. Oral Copulation While in Custody
1023–1029. Reserved for Future Use

(iii) Sodomy

1030. Sodomy by Force, Fear, or Threats
1031. Sodomy in Concert
1032. Sodomy of an Intoxicated Person
1033. Sodomy of an Unconscious Person
1034. Sodomy of a Disabled Person
1035. Sodomy of a Disabled Person in a Mental Hospital
1036. Sodomy by Fraud

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1037. Sodomy While in Custody
1038–1044. Reserved for Future Use

(iv) Sexual Penetration

1045. Sexual Penetration by Force, Fear, or Threats
1046. Sexual Penetration in Concert
1047. Sexual Penetration of an Intoxicated Person
1048. Sexual Penetration of an Unconscious Person
1049. Sexual Penetration of a Disabled Person
1050. Sexual Penetration of a Disabled Person in a Mental Hospital
1051. Sexual Penetration by Fraud
1052–1059. Reserved for Future Use

(v) Lewd and Lascivious Act

1060. Lewd or Lascivious Act: Dependent Person
1061–1069. Reserved for Future Use

B. AGAINST MINORS ONLY

(i) Unlawful Sexual Intercourse

1070. Unlawful Sexual Intercourse: Defendant 21 or Older
1071. Unlawful Sexual Intercourse: Minor More Than Three Years Younger
1072. Misdemeanor Unlawful Sexual Intercourse: Minor Within Three Years of Defendant's Age
1073–1079. Reserved for Future Use

(ii) Oral Copulation

1080. Oral Copulation With Person Under 14
1081. Oral Copulation With Minor: Defendant 21 or Older
1082. Oral Copulation With Person Under 18
1083–1089. Reserved for Future Use

(iii) Sodomy

1090. Sodomy With Person Under 14

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1091. Sodomy With Minor: Defendant 21 or Older
1092. Sodomy With Person Under 18
1093–1099. Reserved for Future Use

(iv) Sexual Penetration

1100. Sexual Penetration With Person Under 14
1101. Sexual Penetration With Minor: Defendant 21 or Older
1102. Sexual Penetration With Person Under 18
1103–1109. Reserved for Future Use

(v) Lewd And Lascivious Act

1110. Lewd or Lascivious Act: Child Under 14 Years
1111. Lewd or Lascivious Act: By Force or Fear
1112. Lewd or Lascivious Act: Child 14 or 15 Years
1113–1119. Reserved for Future Use

(vi) Other Offenses

1120. Continuous Sexual Abuse
1121. Annoying or Molesting a Child in a Dwelling
1122. Annoying or Molesting a Child
1123. Aggravated Sexual Assault of Child Under 14 Years
1124–1139. Reserved for Future Use

C. OTHER SEX RELATED OFFENSES

(i) Obscene or Harmful Matter

1140. Showing or Sending Harmful Material to Seduce a Minor
1141. Distributing Obscene Matter Showing Sexual Conduct by a Minor
1142. Distributing or Intending to Distribute Obscene Material
1143. Obscene Live Conduct
1144–1149. Reserved for Future Use

(ii) Pimping, Pandering, Prostitution

1150. Pimping
1151. Pandering

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1152. Child Procurement
1153. Prostitution: Engaging in Act
1154. Prostitution: Soliciting Another
1155. Prostitution: Agreeing to Engage in Act
1156. Loitering: For Prostitution
1157–1159. Reserved for Future Use

(iii) Conduct in Public

1160. Indecent Exposure
1161. Lewd Conduct in Public
1162. Soliciting Lewd Conduct in Public
1163–1169. Reserved for Future Use

(iv) Failure to Register

1170. Failure to Register as Sex Offender
1171–1179. Reserved for Future Use

(v) Other Offenses

1180. Incest With a Minor
1181. Sexual Abuse of Animal
1182–1189. Reserved for Future Use

D. EVIDENCE

1190. Other Evidence Not Required to Support Testimony in Sex Offense Case
1191. Evidence of Uncharged Sex Offense
1192. Testimony on Rape Trauma Syndrome
1193. Testimony on Child Sexual Abuse Accommodation Syndrome
1194. Consent: Prior Sexual Intercourse
1195–1199. Reserved for Future Use

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A. AGAINST ADULT OR MINOR

(i) Rape

1000. Rape or Spousal Rape by Force, Fear, or Threats

The defendant is charged [in Count ____] with rape [of his wife] by force.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with a woman;**
2. **He and the woman were (not married/married) to each other at the time of the intercourse;**
3. **The woman did not consent to the intercourse;**

AND

4. **The defendant accomplished the intercourse by**

<Alternative 4A—force or fear>

[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.]

<Alternative 4B—future threats of bodily harm>

[threatening to retaliate in the future against the woman or someone else when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 4C—threat of official action>

[threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by federal, state, or local government who has authority to incarcerate, arrest, or deport. The woman must have reasonably believed that the defendant was a public official even if he was not.]

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Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]

[To _consent,_ a woman must act freely and voluntarily and know the nature of the act.]

[A woman who initially consents to an act of intercourse may change her mind during the act. If she does so, under the law, the act of intercourse is then committed without her consent if:

1. **She communicated to the defendant that she objected to the act of intercourse and attempted to stop the act;**
2. **She communicated her objection through words or acts that a reasonable person would have understood as showing her lack of consent;**

AND

3. **The defendant forcibly continued the act of intercourse despite her objection.]**

[Evidence that the defendant and the woman (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the woman (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[Intercourse is _accomplished by force_ if a person uses enough physical force to overcome the woman's will.]

[_Duress_ means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do [or submit to] something that she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the woman's age and her relationship to the defendant.]

[_Retribution_ is a form of payback or revenge.]

[_Menace_ means a threat, statement, or act showing an intent to injure someone.]

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[Intercourse is *accomplished by fear* if the woman is actually and reasonably afraid [or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it].]

[A woman must be alive at the time of the sexual intercourse for the crime of rape to occur.]

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of rape or spousal rape. If spousal rape is charged, the court must include the appropriate bracketed language throughout the instruction to indicate that the parties were married.

The court should select the appropriate alternative in element 4 describing how the sexual intercourse was allegedly accomplished.

Rape requires that the victim be alive at the moment of intercourse. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–1177 [270 Cal.Rptr. 286, 791 P.2d 965]; *People v. Carpenter* (1997) 15 Cal.4th 312, 391 [63 Cal.Rptr.2d 1, 935 P.2d 708].) Intercourse with a deceased victim may constitute attempted rape if the defendant intended to rape a live victim. (*People v. Kelly* (1992) 1 Cal.4th 495, 524–526 [3 Cal.Rptr.2d 677, 822 P.2d 385].) If this is an issue in the case, give the bracketed sentence that begins with "A woman must be alive . . ."

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (See *People v. Williams* (1992) 4 Cal.4th 354,

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362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

Related Instructions

CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

Rape:

- Elements. Pen. Code, § 261(a)(2), (6) & (7).
- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Duress Defined. Pen. Code, § 261(b).
- Menace Defined. Pen. Code, § 261(c).
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Fear Defined. *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [level of fear].
- Force Defined. *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Mistake of Fact Regarding Consent. *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].
- Withdrawal of Consent. *In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–12.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [2], 142.23[1][e] (Matthew Bender).

Spousal Rape:

- Elements. Pen. Code, § 262(a)(1), (4) & (5).

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- Duress Defined. Pen. Code, § 262(c).
- Menace Defined. Pen. Code, § 262(d).
- Mistake of Fact Regarding Consent. *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1148–1149 [222 Cal.Rptr. 630]; see *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 18.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [2], 142.23[1][e] (Matthew Bender).

COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

Penal Code section 262 requires that the intercourse be "against the person's [or victim's] will." (Pen. Code, § 262(a)(1), (4) & (5).) "Against the will" has been defined as without consent. (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

"[T]he offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. . . . '[I]t is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.' " (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].)

The instruction includes definitions of "duress," "menace," and the sufficiency of "fear" because those terms have meanings in the context of rape that are technical and may not be readily apparent to jurors. (See Pen. Code, §§ 262(c) [duress] and (d) [menace]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear].)

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The term "force" as used in the rape statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin, supra,* the Supreme Court further stated,

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361] . . . .)

(*Ibid.* [emphasis in original].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Rape. Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape. Pen. Code, §§ 663, 261.
- Attempted Spousal Rape. Pen. Code, §§ 663, 262.
- Battery. Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38–39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included of attempted rape].

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RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in sexual intercourse by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant's argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

Minor Victim and Unanimity

"Generic testimony" by a victim who was 15 and 16 years old does not deprive a defendant of a due process right to defend against the charges. If the victim "specifies the type of conduct involved, its frequency, and that the conduct occurred during the limitation period, nothing more is required to establish the substantiality of the victim's testimony." (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1446 [127 Cal.Rptr.2d 472] [affirming conviction for multiple counts of rape under Pen. Code, § 261(a)(2); citing *People v. Jones* (1990) 51 Cal.3d 294, 316 [270 Cal.Rptr. 611, 792 P.2d 643]].)

When there is no reasonable likelihood the jury will disagree on particular acts of molestation, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. (*People v. Matute, supra,* 103 Cal.App.4th at p. 1448; *People v. Jones, supra,* 51 Cal.3d at pp. 321–322; see CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*.)

Mistake-of-Fact Defense and Developmental Disability

A defendant cannot base a reasonable-belief-of-consent defense on the fact that he is developmentally disabled and, as a result, did not act as a reasonable person would have acted. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].)

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Multiple Rapes

A penetration, however slight, completes the crime of rape; therefore a separate conviction is proper for each penetration that occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329–334 [256 Cal.Rptr. 401, 768 P.2d 1078].)

Reporting Requirement for Spousal Rape

The threshold requirement that an allegation of spousal rape be corroborated to avoid the reporting requirement (see Pen. Code, § 262(b)) is not a factual determination for the jury. (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1336–1337 [107 Cal.Rptr.2d 889].)

Resistance Is Not Required

Resistance by the victim is not required for rape; any instruction to that effect is erroneous. (*People v. Barnes* (1986) 42 Cal.3d 284, 292, 302 [228 Cal.Rptr. 228, 721 P.2d 110].)

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1001. Rape or Spousal Rape in Concert

The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count ____] with committing rape by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>].

To prove that a defendant is guilty of this crime, the People must prove that:

<*Alternative A—defendant committed rape*>

[1.] [The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<*Alternative B—defendant aided and abetted*>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed forcible rape.]

To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed rape, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted rape, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved rape in concert.

<*MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON RAPE AND AIDING AND ABETTING ARE GIVEN.*>

[To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 264.1; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on rape. Give one or more of the following instructions defining rape: CALCRIM No. 1000, or CALCRIM Nos. 1005–1114.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles* and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

AUTHORITY

- Elements. Pen. Code, § 264.1; see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Forcible Rape Defined. Pen. Code, § 261(a)(2).
- Spousal Rape Defined. Pen. Code, § 262(a)(1).
- Aiding and Abetting. *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 19.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [2][c] (Matthew Bender).

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COMMENTARY

There is conflicting authority whether all types of forcible rape may be the basis for charging a rape in concert. (Compare *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [rape by duress, menace, and fear unavailable under Pen. Code, § 264.1] and *People v. Mom* (2000) 80 Cal.App.4th 1217, 1222–1223 [96 Cal.Rptr.2d 172] [§ 264.1 only includes rape involving "force" and "violence"], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089], with *People v. Wheeler* (1977) 71 Cal.App.3d 902, 907 [139 Cal.Rptr. 737] [§ 264.1 includes any unlawful use of force, including threat of harm].) The instruction addresses rape accomplished by force or violence. (See Pen. Code, §§ 261(a)(2), 264.1.) If another basis for charging rape in concert is argued, for example, rape by duress, menace, fear, or threats (see Pen. Code, § 261(a)(2), (6), & (7)), see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats* for appropriate language that may be included on request.

Penal Code section 264.1 deals with a crime of substance, and is not an enhancement statute, as discussed in *People v. Best* (1983) 143 Cal.App.3d 232, 237 [191 Cal.Rptr. 614].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Rape. Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape. Pen. Code, §§ 664, 261.
- Battery. Pen. Code, § 242.
- Rape. Pen. Code, §§ 261, 262.

RELATED ISSUES

Need Not Personally Participate

A defendant may be convicted of rape in concert if he or she was at the general scene of the rape and aided and abetted another person in accomplishing the act, even if the defendant did not personally participate in the act or was not personally present at the exact scene of the act. (See *People v. Lopez* (1981) 116 Cal.App.3d 882, 887–888 [172 Cal.Rptr. 374];

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People v. Barnett (1976) 54 Cal.App.3d 1046, 1049 [127 Cal.Rptr. 88] [oral copulation in concert although not in room when act took place]; *People v. Champion* (1995) 9 Cal.4th 879, 933 [39 Cal.Rptr.2d 547] [rape in concert by holding victim's family at gun point in another room].) However, the Supreme Court has not resolved whether a person acts in concert when his accomplice assists in the commission of the crime, but is not present at the general scene (for example, when the accomplice provides the rapist with information about the victim, or pays the rapist to commit the act). (*People v. Champion* (1995) 9 Cal.4th 879, 933, fn. 22 [891 P.2d 93].)

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1002. Rape of Intoxicated Woman or Spouse

The defendant is charged [in Count ____] with raping (a woman/ his wife) while she was intoxicated.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with a woman;**
2. **He and the woman were (not married/married) to each other at the time of the intercourse;**
3. **The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting;**

AND

4. **The defendant knew or reasonably should have known that the effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <*If appropriate, insert controlled substance*> **(is/are) [a] controlled substance[s].]**

<*Defense: Reasonable Belief Capable of Consent*>

[The defendant is not guilty of this crime if he actually and reasonably believed that the woman was capable of consenting to sexual intercourse, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the

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woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify controlled substances, if the parties agree.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions

CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, §§ 261(a)(3), 262(a)(2).
- Consent Defined. Pen. Code, § 261.6.
- Controlled Substances. Health & Safety Code, §§ 11054–11058; see *People v. Avila (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].*
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Anesthetic Effect. See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- General Intent and Knowledge Requirements. *People v. Linwood* (2003) 105 Cal.App.4th 59, 67–72 [129 Cal.Rptr.2d 73] [statute is not impermissibly vague and uses appropriate criminal negligence standard].
- "Prevented From Resisting" Defined. *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–8, 16, 18.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [5], 142.23[1][e] (Matthew Bender).

COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

- Attempted Rape. Pen. Code, §§ 663, 261(a)(3).
- Attempted Rape of Intoxicated Spouse. Pen. Code, §§ 663, 262(a)(2).

RELATED ISSUES

Administering Drugs to Assist Commission of Felony

A person who administers to someone else any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with the intent to enable or assist himself or herself or any other person to commit a felony is guilty of a felony. (Pen. Code, § 222.)

See the Related Issues section to CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats.*

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1003. Rape of Unconscious Woman or Spouse

The defendant is charged [in Count ____] with raping (a woman/ his wife) who was unconscious of the nature of the act.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with a woman;**
2. **He and the woman were (not married/married) to each other at the time of the intercourse;**
3. **The woman was unable to resist because she was unconscious of the nature of the act;**

AND

4. **The defendant knew that the woman was unable to resist because she was unconscious of the nature of the act.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

A woman is *unconscious of the nature of the act* if she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from her/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose when it served no professional purpose).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If spousal rape is charged, include the appropriate language throughout the instruction to indicate that the parties were married.

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Select the appropriate language defining "unconscious of the nature of the act" based on the facts of the case.

Related Instructions

CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, §§ 261(a)(4), 262(a)(3).
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Unconscious of Nature of Act. *People v. Howard* (1981) 117 Cal.App.3d 53, 55 [172 Cal.Rptr. 539] [total unconsciousness is not required]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–8, 15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [5] (Matthew Bender).

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, §§ 261(a)(4)(B)–(D), 262(a)(3)(B), (C).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

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LESSER INCLUDED OFFENSES

- Attempted Rape of Unconscious Woman. Pen. Code, §§ 663, 261(a)(4).
- Attempted Rape of Unconscious Spouse. Pen. Code, §§ 663, 262(a)(3).

RELATED ISSUES

Advance Consent

Neither a woman's actual "advance consent" nor a man's belief in "advance consent" eliminates the wrongfulness of a man's conduct in knowingly depriving an unconscious woman of her freedom of choice both at the initiation of and during sexual intercourse. A person who commits the prohibited act necessarily acts with a wrongful intent. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 37 [124 Cal.Rptr.2d 898].)

See the Related Issues section in CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

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1004. Rape of a Disabled Woman

The defendant is charged [in Count ____] with raping a mentally or physically disabled woman.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with a woman;**
2. **He and the woman were not married to each other at the time of the intercourse;**
3. **The woman had a (mental disorder/developmental or physical disability) that prevented her from legally consenting;**

AND

4. **The defendant knew or reasonably should have known that the woman had a (mental disorder/developmental or physical disability) that prevented her from legally consenting.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

A woman is *prevented from legally consenting* if she is unable to understand the act, its nature, and possible consequences.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 261(a)(1).

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- Consent Defined. Pen. Code, § 261.6; *People v. Boggs* (1930) 107 Cal.App. 492, 495–496.
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–8, 17.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [5] (Matthew Bender).

COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

- Attempted Rape. Pen. Code, §§ 663, 261.

RELATED ISSUES

No Duty to Define "Developmental Disability"

There is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation].)

See the Related Issues section under CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

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1005. Rape by Fraud

The defendant is charged [in Count ____] with rape by fraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with a woman;**
2. **He and the woman were not married to each other at the time of the intercourse;**
3. **The woman submitted to the intercourse because she believed the defendant was her husband;**

AND

4. **The defendant tricked her, lied to her, [used an artifice or pretense,] or concealed information from her, intending to make her believe they were married to each other.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 261(a)(5).
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–8, 13.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [6] (Matthew Bender).

COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

- Attempted Rape. Pen. Code, §§ 663, 261.

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

(New January 2006)

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(ii) Oral Copulation

1015. Oral Copulation by Force, Fear, or Threats

The defendant is charged [in Count ____] with oral copulation by force.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with someone else;**
2. **The other person did not consent to the act;**

AND

3. **The defendant accomplished the act by**

<Alternative 3A—force or fear>

[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.]

<Alternative 3B—future threats of bodily harm>

[threatening to retaliate against someone when there was a reasonable possibility that the threat would be carried out. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 3C—threat of official action>

[threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has the authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

***Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

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[In order to *consent,* a person must act freely and voluntarily and know the nature of the act.]

[Evidence that the defendant and the person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

[The defendant is not guilty of forcible oral copulation if he or she actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the person consented. If the People have not met this burden, you must find the defendant not guilty.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Select the appropriate alternative in element 3 to instruct how the act was allegedly accomplished.

AUTHORITY

- Elements. Pen. Code, § 288a(c)(2) & (3), (k).
- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Oral Copulation Defined. Pen. Code, § 288a(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Threatening to Retaliate Defined. Pen. Code, § 288a(*l*).
- Fear Defined. *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [2] (Matthew Bender).

COMMENTARY

Penal Code section 288a requires that the oral copulation be "against the will" of the other person. (Pen. Code, § 288a(c)(2) & (3), (k).) "Against the will" has been defined as "without consent." (*People v. Key* (1984) 153

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Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible oral copulation that is technical and may not be readily apparent to jurors. (See *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288a does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

The term "force" as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826]). In *People v. Griffin, supra,* the Supreme Court further stated,

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse

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was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

(*People v. Griffin, supra*, 33 Cal.4th at pp. 1023–1024 [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826] [*Griffin* reasoning applies to violation of Pen. Code, § 288a(c)(2)].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.
- Battery. Pen. Code, § 242.

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in oral copulation by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant's argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to oral copulation was withdrawn, see CALCRIM No.

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1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Multiple Acts of Oral Copulation

An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–1447 [278 Cal.Rptr. 452] [defendant properly convicted of multiple violations of Pen. Code, § 288a where he interrupted the acts of copulation and forced victims to change positions].)

Sexual Organ

A man's "sexual organ" for purposes of Penal Code section 288a includes the penis and the scrotum. (Pen. Code, § 288a; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448–1449 [278 Cal.Rptr. 452].)

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1016. Oral Copulation in Concert

The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count ____] with committing oral copulation by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>].

To prove that a defendant is guilty of this crime, the People must prove that:

<*Alternative A—defendant committed oral copulation*>

[1.] [The defendant personally committed oral copulation and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<*Alternative B—defendant aided and abetted*>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed oral copulation.]

To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed oral copulation, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted oral copulation, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved oral copulation in concert.

<*MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ORAL COPULATION AND AIDING AND ABETTING ARE GIVEN.*>

[To prove the crime of oral copulation in concert, the People do not have to prove a prearranged plan or scheme to commit oral copulation.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 288a(d).) The court also has a **sua sponte** duty to instruct on oral copulation. Give one or more of the following instructions defining oral copulation: CALCRIM No. 1015 or CALCRIM Nos. 1017–1022.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

AUTHORITY

- Elements. Pen. Code, § 288a(d).
- Aiding and Abetting. *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658] [in context of sodomy in concert].
- Consent Defined. *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31, 36.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [2][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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- Assault With Intent to Commit Oral Copulation. Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [when forcible crime is charged].
- Attempted Oral Copulation. Pen. Code, §§ 664, 288a.
- Attempted Oral Copulation in Concert. Pen. Code, §§ 663, 288a(d).
- Battery. Pen. Code, § 242.
- Oral Copulation. Pen. Code, § 288a.

RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

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1017. Oral Copulation of an Intoxicated Person

The defendant is charged [in Count ____] with oral copulation of a person while that person was intoxicated.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with another person;**
2. **An (intoxicating/anesthetic/controlled) substance prevented the other person from resisting;**

AND

3. **The defendant knew or reasonably should have known that the effect of an (intoxicating/anesthetic/controlled) substance prevented the other person from resisting.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ *<If appropriate, insert controlled substance>* **(is/are) [a] controlled substance[s].]**

<Defense: Reasonable Belief Capable of Consent>

[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the person was capable of consenting to oral copulation, even if the defendant's belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that

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the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions

CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 288a(a), (i).
- Consent Defined. Pen. Code, § 261.6.
- Controlled Substances. Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Anesthetic Effect. See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- "Prevented From Resisting" Defined. See *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315] [rape of intoxicated woman].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

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1018. Oral Copulation of an Unconscious Person

The defendant is charged [in Count ____] with oral copulation of a person who was unconscious of the nature of the act.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with another person;**
2. **The other person was unable to resist because (he/she) was unconscious of the nature of the act;**

AND

3. **The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

A person is *unconscious of the nature of the act* if he or she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from the person/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the oral copulation served a professional purpose when it served no professional purpose).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

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AUTHORITY

- Elements. Pen. Code, § 288a(a), (f).
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [5] (Matthew Bender).

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 288a(f)(2)–(4).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

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1019. Oral Copulation of a Disabled Person

The defendant is charged [in Count ____] with oral copulation of a mentally or physically disabled person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with someone else;**
2. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

3. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

A person is *prevented from legally consenting* if he or she is unable to understand the act, its nature, and possible consequences.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 288a(a), (g).

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- Consent Defined. Pen. Code, § 261.6; *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

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1020. Oral Copulation of a Disabled Person in a Mental Hospital

The defendant is charged [in Count ____] with oral copulation of a mentally or physically disabled person in a mental hospital.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with someone else;**
2. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**
3. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

4. **At the time of the act, both people were confined in a state hospital or other mental health facility.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

A person is *incapable of giving legal consent* if he or she is unable to understand the act, its nature, and possible consequences.

[_____ <*Insert name of facility*> is a (state hospital/mental health facility).] [A *state hospital* or *other mental health facility* includes a state hospital for the care and treatment of the mentally disordered or any other public or private facility approved by a county mental health director for the care and treatment of the mentally disordered.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify a facility as a state hospital or other mental health facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether an institution is a state hospital or other mental health facility, give the final bracketed sentence. (See Pen. Code, § 288a(h).)

Related Instructions

CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 288a(a), (h).
- State Hospital or Mental Health Facility Defined. Pen. Code, § 288a(h); see Welf. & Inst. Code, § 7100 [county psychiatric facilities], § 7200 [state hospitals for mentally disordered], § 7500 [state hospitals for developmentally disabled].
- Legal Consent. *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

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RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

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1021. Oral Copulation by Fraud

The defendant is charged [in Count ____] with oral copulation by fraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with someone else;**
2. **The other person submitted to the oral copulation because (he/she) believed the person was (his/her) spouse;**

AND

3. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe they were married to each other.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 288a(a), (j).
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crime Against Decency, §§ 31–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [6] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

(New January 2006)

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1022. Oral Copulation While in Custody

The defendant is charged [in Count ____] with oral copulation committed while (he/she) was confined in (state prison/a local detention facility).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of oral copulation with someone else;**

AND

2. **At the time of the act, the defendant was confined in a (state prison/local detention facility).**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

[_____ <*insert name of facility*> **is a (state prison/local detention facility).] [A state prison is any prison or institution maintained by the Department of Corrections.] [A local detention facility includes any city, county, or regional jail or other facility used to confine adults [or both adults and minors].]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify a state prison or local detention facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether the defendant was confined in a state prison or local detention facility, give the second or third bracketed sentences (or both, if necessary). (See Pen. Code, §§ 4504, 5003, 6031.4.)

Related Instructions

CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

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AUTHORITY

- Elements. Pen. Code, § 288a(a), (e).
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- State Prison Defined. Pen. Code, §§ 4504, 5003.
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–32.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [4] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

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(iii) Sodomy

1030. Sodomy by Force, Fear, or Threats

The defendant is charged [in Count ____] with sodomy by force.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with another person;**
2. **The other person did not consent to the act;**

AND

3. **The defendant accomplished the act:**

<Alternative 3A—force or fear>

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.]

<Alternative 3B—future threats of bodily harm>

[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 3C—threat of official action>

[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

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[In order to *consent,* a person must act freely and voluntarily and know the nature of the act.]

[Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the other person (requested/suggested/ communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or he or she is actually but unreasonably afraid and the defendant knows of his or her fear and takes advantage of it].]

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of forcible sodomy if (he/she) actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of sodomy. (Pen. Code, § 286(c)(2) & (3), (k); *People v. Martinez* (1986) 188 Cal.App.3d 19, 24–26 [232 Cal.Rptr. 736]; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1407 [260 Cal.Rptr. 134].)

The court should select the appropriate alternative in element 3 to instruct how the sodomy was accomplished.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

AUTHORITY

- Elements. Pen. Code, § 286(c)(2) & (3), (k).
- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Threatening to Retaliate Defined. Pen. Code, § 286(*l*).
- Fear Defined. *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25, 26, 28.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [2] (Matthew Bender).

COMMENTARY

Penal Code section 286 requires that the sodomy be "against the will" of the other person. (Pen. Code, § 286(c)(2) & (3), (k).) "Against the will" has been defined as "without consent." (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible sodomy that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 286 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon*, *supra*, 170 Cal.App.3d at 50. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

The term "force" as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin, supra,* the Supreme Court further stated,

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that

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> suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, [former] subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

(*Ibid.* [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Forcible Sodomy. Pen. Code, §§ 664, 286.
- Battery. Pen. Code, § 242; *People v. Hughes* (2002) 27 Cal.4th 287, 366 [116 Cal.Rptr.2d 401, 39 P.3d 432].

Non-forcible sex crimes requiring the perpetrator and victim to be within certain age limits are not lesser included offenses of forcible sex crimes. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 [100 Cal.Rptr.2d 70].)

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in sodomy by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927,

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937–938 [26 Cal.Rptr.2d 567] [rejecting defendant's argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sodomy was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Victim Must Be Alive

Sodomy requires that the victim be alive at the moment of penetration. (*People v. Davis* (1995) 10 Cal.4th 463, 521, fn. 20 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176 [270 Cal.Rptr. 286, 791 P.2d 965].) Sodomy with a deceased victim can constitute attempted sodomy if the defendant attempted an act of forcible sodomy while the victim was alive or with the mistaken belief that the victim was alive. (*People v. Davis, supra,* 10 Cal.4th at p. 521, fn. 20; *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683].)

Penetration May Be Through Victim's Clothing

If there is penetration into a victim's anus by a perpetrator's sexual organ, it is sodomy, even if the victim is wearing clothing at the time. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85–86 [34 Cal.Rptr.3d 538]).

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1031. Sodomy in Concert

The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count ____] with committing sodomy by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>].

To prove that a defendant is guilty of this crime, the People must prove that:

<*Alternative A—defendant committed sodomy*>

[1.] [The defendant personally committed sodomy and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<*Alternative B—defendant aided and abetted*>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sodomy.]

To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed sodomy, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted sodomy, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sodomy in concert.

<*MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SODOMY AND AIDING AND ABETTING ARE GIVEN.*>

[To prove the crime of sodomy in concert, the People do not have to prove a prearranged plan or scheme to commit sodomy.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sodomy. Give one or more of the following instructions defining sodomy: CALCRIM No. 1030 or CALCRIM Nos. 1032–1037.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

Related Instructions

See CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

AUTHORITY

- Elements. Pen. Code, § 286(d).
- Aiding and Abetting. *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 30.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [2][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in

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context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].

- Attempted Sodomy. Pen. Code, §§ 664, 286.
- Attempted Sodomy in Concert. Pen. Code, §§ 663, 286(d).
- Battery. Pen. Code, § 242.
- Sodomy. Pen. Code, §§ 663, 286.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

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1032. Sodomy of an Intoxicated Person

The defendant is charged [in Count ____] with sodomy of a person while that person was intoxicated.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with another person;**
2. **The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the other person from resisting;**

AND

3. **The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting.**

Sodomy **is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <*If appropriate, insert controlled substance[s]*>**(is/are) [a] controlled substance[s].]**

<*Defense: Reasonable Belief Capable of Consent*>

[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the other person was capable of consenting to the act, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other

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person was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 286(i); *People v. Avila* (2000) 80 Cal.App.4th 791, 802–803 [95 Cal.Rptr.2d 651].
- Anesthetic Effect Defined. *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651].
- Consent Defined. Pen. Code, § 261.6.
- Controlled Substances Defined. Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Prevented From Resisting Defined. See *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–467 [in context of rape].
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 26, 29.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Attempted Sodomy of Intoxicated Person. Pen. Code, §§ 664, 286(i).
- Battery. Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

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1033. Sodomy of an Unconscious Person

The defendant is charged [in Count ____] with sodomy of a person who was unconscious of the nature of the act.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with another person;**
2. **The other person was unable to resist because (he/she) was unconscious of the nature of the act;**

AND

3. **The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

A person is *unconscious of the nature of the act* if he or she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from the person/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose when it served no professional purpose).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

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AUTHORITY

- Elements. Pen. Code, § 286(f).
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Unconscious of Nature of Act. *People v. Howard* (1981) 117 Cal.App.3d 53, 55 [172 Cal.Rptr. 539] [total unconsciousness is not required]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 26, 29.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [5] (Matthew Bender).

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 286(f)(2)–(4).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

- Attempted Sodomy of Unconscious Person. Pen. Code, §§ 664, 286(f).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

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1034. Sodomy of a Disabled Person

The defendant is charged [in Count ____] with sodomy of a mentally or physically disabled person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with another person;**
2. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

3. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

A person is *prevented from legally consenting* if he or she is unable to understand the act, its nature, and possible consequences.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 286(g).

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- Prevented from Legally Consenting, Defined. *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P.618].
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1928) 62 Cal.App. 450, 452 [217 P.121] [ejaculation is not required].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 26, 29.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy of Disabled Person. Pen. Code, §§ 664, 286(g).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

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1035. Sodomy of a Disabled Person in a Mental Hospital

The defendant is charged [in Count ____] with sodomy of a mentally or physically disabled person in a mental hospital.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with another person;**
2. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**
3. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

4. **At the time of the act, both people were confined in a state hospital or other mental health facility.**

Sodomy **is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

A person is *prevented from legally consenting* if he or she is unable to understand the act, its nature, and probable consequences.

[_____ <*If appropriate, insert name of facility*> is a (state hospital/mental health facility).] [A *state hospital or other mental health facility* includes a state hospital for the care and treatment of the mentally disordered or any other public or private facility approved by a county mental health director for the care and treatment of the mentally disordered.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify a facility as a state hospital or other mental health facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether an institution is a state hospital or other mental health facility, give the final bracketed sentence. (See Pen. Code, § 286(h).)

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. Pen. Code, § 286(h).
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1928) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- State Hospital or Mental Health Facility Defined. Pen. Code, § 286(h); see Welf. & Inst. Code, § 7100 [county psychiatric facilities], § 7200 [state hospitals for mentally disordered], § 7500 [state hospitals for developmentally disabled].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 26, 29.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy of Disabled Person. Pen. Code, §§ 664, 286(h).

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RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

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1036. Sodomy by Fraud

The defendant is charged [in Count ____] with sodomy by fraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with someone else;**
2. **The other person submitted to the sodomy because (she/he) believed the defendant was (her/his) spouse;**

AND

3. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that they were married to each other.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 286(j).
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 26, 28.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [6] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy by Fraud. Pen. Code, §§ 664, 286(j).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

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1037. Sodomy While in Custody

The defendant is charged [in Count ____] with sodomy while he was confined in (state prison/a local detention facility).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sodomy with another person;**

AND

2. **At the time of the act, the defendant was confined in (state prison/a local detention facility).**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[_____ <*Insert name of facility*> is a (state prison/local detention facility).] [A *state prison* is any prison or institution maintained by the Department of Corrections.] [A *local detention facility* includes any city, county, or regional jail or other facility used to confine adults [or both adults and minors].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify a state prison or local detention facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether the defendant was confined in a state prison or local detention facility, give the second or third bracketed sentences (or both, if necessary). (See Pen. Code, §§ 4504, 5003, 6031.4.)

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

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AUTHORITY

- Elements. Pen. Code, § 286(e); *People v. West* (1991) 226 Cal.App.3d 892, 898 [277 Cal.Rptr. 237] [only applies to inmates].
- Local Detention Facility Defined. Pen. Code, § 6031.4.
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P.121] [ejaculation is not required].
- State Prison Defined. Pen. Code, §§ 4504, 5003.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [4] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy While in Custody. Pen. Code, §§ 664, 286(e).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

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(iv) Sexual Penetration

1045. Sexual Penetration by Force, Fear, or Threats

The defendant is charged [in Count ____] with sexual penetration by force.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
3. **The other person did not consent to the act;**

AND

4. **The defendant accomplished the act:**

<Alternative 4A—force or fear>

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to anyone.]

<Alternative 4B—future threats of bodily harm>

[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 4C—threat of official action>

[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

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Sexual penetration means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.

[A _foreign object, substance, instrument, or device_ includes any part of the body except a sexual organ.] [An _unknown object_ includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for _sexual abuse_ means penetration for the purpose of causing pain, injury, or discomfort.]

[In order to _consent,_ a person must act freely and voluntarily and know the nature of the act.]

[Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the other person (requested/suggested/ communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is _accomplished by force_ if a person uses enough physical force to overcome the other person's will.]

[_Duress_ means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[_Retribution_ is a form of payback or revenge.]

[_Menace_ means a threat, statement, or act showing an intent to injure someone.]

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[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of forcible sexual penetration if (he/she) actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of sexual penetration.

The court should select the appropriate alternative in element 4 to instruct how the sexual penetration was accomplished.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

AUTHORITY

- Elements. Pen. Code, § 289(a)(1) & (2), (g).
- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].

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- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rtpr. 170] [a finger is a "foreign object"].
- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Sexual Penetration Defined. Pen. Code, § 289(k); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Threatening to Retaliate Defined. Pen. Code, § 289(*l*).
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Fear Defined. *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Intent. *People v. Senior* (1992) 3 Cal.App.4th 765, 776 [5 Cal.Rptr.2d 14] [specific intent is "purpose of sexual arousal, gratification, or abuse"].
- Mistake of Fact Regarding Consent. See *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337] [in context of kidnapping and rape].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 49.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 165.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [2] (Matthew Bender).

COMMENTARY

Penal Code section 289 requires that the sexual penetration be "against the victim's will." (Pen. Code, § 289(a)(1) & (2), (g).) "Against the will" has been defined as "without consent." (See *People v. Key* (1984) 153

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Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction include an optional definition of the sufficiency of "fear" because that term has meaning in the context of forcible sex offenses that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear in context of sodomy and oral copulation]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 289 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

The term "force" as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin, supra,* the Supreme Court further stated,

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse

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was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361] . . . .)

(*Ibid.* at 1023–1024 [emphasis in original].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Forcible Sexual Penetration. See Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape].
- Attempted Forcible Sexual Penetration. Pen. Code, §§ 664, 289(a)(1) & (2), (g).
- Battery. Pen. Code, § 242.

Nonforcible sex crimes requiring the perpetrator and victim to be within certain age limits are not lesser included offenses of forcible sex crimes. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 [100 Cal.Rptr.2d 70].)

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in sexual penetration by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c [wobbler offense].) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant's argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sexual penetration was withdrawn, see CALCRIM No.

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1000, *Rape or Spousal Rape by Force, Fear, or Threats,* for language that may be adapted for use in this instruction.

Minor Victim

When sexual penetration is committed against the will of a person who is incapable of consent, such as a baby, and is accomplished by physical force that results in physical injury to the victim, the statutory requirements "against the will" and "use of force" are fully satisfied. (*People v. White* (1986) 179 Cal.App.3d 193, 202 [224 Cal.Rptr. 467].)

Multiple Penetrations

A violation of section 289 is complete when "slight" penetration occurs. A new and separate violation is completed each time a new and separate penetration, however slight, occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [256 Cal.Rtpr. 401, 768 P.2d 1078] [disapproving *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1097 [236 Cal.Rptr. 822]].)

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1046. Sexual Penetration in Concert

The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count ____] with committing sexual penetration by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>].

To prove that a defendant is guilty of this crime, the People must prove that:

<*Alternative A—defendant committed sexual penetration*>

[1.] [The defendant personally committed sexual penetration and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<*Alternative B—defendant aided and abetted*>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sexual penetration.]

To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed sexual penetration, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted sexual penetration, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sexual penetration in concert.

<*MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SEXUAL PENETRATION AND AIDING AND ABETTING ARE GIVEN.*>

[To prove the crime of sexual penetration in concert, the People do not have to prove a prearranged plan or scheme to commit sexual penetration.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sexual penetration. Give one or more of the following instructions defining sexual penetration: CALCRIM Nos. 1045 or 1047–1051.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rtpr. 658].)

Related Instructions

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

AUTHORITY

- Elements. Pen. Code, §§ 264.1, 289(a)(1); see People v. Mom (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [rape in concert requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Aiding and Abetting. *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 19.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [2][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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- Attempted Sexual Penetration. Pen. Code, §§ 664, 289(a)(1).
- Attempted Sexual Penetration in Concert. Pen. Code, §§ 663, 264.1, 289(a)(1).
- Battery. Pen. Code, § 242.
- Sexual Penetration. Pen. Code, § 289(a)(1).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

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1047. Sexual Penetration of an Intoxicated Person

The defendant is charged [in Count ____] with sexual penetration of a person while that person was intoxicated.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or]instrument[,]/ [or]device[,]/ [or] unknown object);**
3. **The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the other person from resisting the act;**

AND

4. **The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <*If appropriate, insert controlled substance*> **(is/are) [a] controlled substance[s].]**

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[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

<Defense: Reasonable Belief Capable of Consent>

[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the person was capable of consenting to the act, even if the defendant's belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 289(e).

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- Controlled Substances Defined. Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Anesthetic Effect Defined. See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- Prevented From Resisting Defined. See *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–467 [98 Cal.Rptr.2d 315] [in context of rape].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 50.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Attempted Sexual Penetration. Pen. Code, §§ 664, 289(a)(1) & (2), (g).
- Attempted Sexual Penetration of Intoxicated Person. Pen. Code, §§ 663, 289(e).
- Battery. Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

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1048. Sexual Penetration of an Unconscious Person

The defendant is charged [in Count ____] with sexual penetration of a person who was unconscious of the nature of the act.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
3. **The other person was unable to resist because (he/she) was unconscious of the nature of the act;**

AND

4. **The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

A person is *unconscious of the nature of the act* if he or she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from the person/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose when it served no professional purpose).

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or

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any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 289(d).
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].
- Unconscious of Nature of Act. *People v. Howard* (1981) 117 Cal.App.3d 53, 55, 540–541 [172 Cal.Rptr. 539] [total unconsciousness is not required; in context of sodomy and oral copulation]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 50.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [5] (Matthew Bender).

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 289(d)(2).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Attempted Sexual Penetration of Unconscious Person. Pen. Code, §§ 664, 289(d).
- Battery. Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

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1049. Sexual Penetration of a Disabled Person

The defendant is charged [in Count ____] with sexual penetration of a mentally or physically disabled person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
3. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

4. **The defendant knew or reasonably should have known that the other person had a (mental disorder/ developmental or physical disability) that prevented (him/ her) from legally consenting.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

A person is *prevented from legally consenting* if he or she is unable to understand the act, its nature, and probable consequences.

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

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[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 289(b).
- Consent Defined. Pen. Code, § 261.6; see *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 50.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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- Attempted Sexual Penetration of Disabled Person. Pen. Code, §§ 664, 289(b).
- Battery. Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

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1050. Sexual Penetration of a Disabled Person in a Mental Hospital

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The defendant is charged [in Count ____] with sexual penetration of a mentally or physically disabled person in a mental hospital.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
3. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**
4. **The defendant knew or reasonably should have known that the other person had a (mental disorder/ developmental or physical disability) that prevented (him/ her) from legally consenting;**

AND

5. **At the time of the act, both people were confined in a state hospital or other mental health facility.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

A person is *prevented from legally consenting* **if he or she is unable to understand the act, its nature, and probable consequences.**

[A *foreign object, substance, instrument, or device* **includes any part of the body except a sexual organ.] [An *unknown object*** **includes any foreign object, substance, instrument, or device, or**

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any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[_____ <*If appropriate, insert name of facility*> is a (state hospital/mental health facility).] [A *state hospital or other mental health facility* includes a state hospital for the care and treatment of the mentally disordered or any other public or private facility approved by a county mental health director for the care and treatment of the mentally disordered.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify a facility as a state hospital or other mental health facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether an institution is a state hospital or other mental health facility, give the final bracketed sentence. (See Pen. Code, § 289(c).)

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 289(c).
- Consent Defined. Pen. Code, § 261.6; see *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235]

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[penetration of genital opening refers to penetration of labia majora, not the vagina].

- State Hospital or Mental Health Facility Defined. Pen. Code, § 289(c); see Welf. & Inst. Code, § 7100 [county psychiatric facilities], § 7200 [state hospitals for mentally disordered], § 7500 [state hospitals for developmentally disabled].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 50.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [5] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Attempted Sexual Penetration of Disabled Person. Pen. Code, §§ 664, 289(c).
- Battery. Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

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1051. Sexual Penetration by Fraud

The defendant is charged [in Count ____] with sexual penetration by fraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**
2. **At the time of the act, the defendant and the other person were not married to each other;**
3. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
4. **The other person submitted to the act because (he/she) believed the person (committing the act/causing the act to be committed) was (his/her) spouse;**

AND

5. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that they were married to each other.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 289(f).
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 49.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [6] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Attempted Sexual Penetration by Fraud. Pen. Code, §§ 664, 289(f).
- Battery. Pen. Code, § 242.

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RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

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(v) Lewd and Lascivious Act

1060. Lewd or Lascivious Act: Dependent Person

The defendant is charged [in Count ____] with a lewd or lascivious act on a dependent person [by force or fear].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a caretaker of a dependent person;**
2. **The defendant, while serving as a caretaker, willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on that person;**

[AND]

3. **The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)**

<Give element 4 when instructing on force or violence>

[AND

4. **In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]**

A *lewd or lascivious act* is any touching of a person with the intent to sexually arouse the perpetrator or the other person. The touching need not be done in a lewd or sexual manner. A *lewd or lascivious act* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

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A *caretaker* is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ <*insert specific facility from Pen. Code, § 288(f)(1)*>, that provides care for dependent persons or for those aged 65 or older.

A *dependent person* is someone who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have been significantly diminished by age.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or dependent person is not required.]

[The *force* used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.]

[*Duress* is a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the dependent person and (his/her) relationship to the defendant.]
[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is accomplished by *fear* if the dependent person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity:When Generic Testimony Of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with using force or fear in committing the lewd act on a dependent person, give bracketed element 4 and the bracketed sentence that begins with "The force must be substantially different." (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [court has **sua sponte** duty to define "force" as used in Pen. Code, § 288(b)(1)]; *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) On request, give any of the relevant bracketed definitions of duress, menace, or fear.

In the paragraph defining "caretaker," insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person. (Pen. Code, § 288(h).)

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Defenses—Instructional Duty

In the context of lewd acts accomplished by force on a minor, there is disagreement as to whether knowing consent by the minor is an affirmative defense. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [208 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero, supra,* 157 Cal.App.3d at pp. 487–488, dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua**

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sponte duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.)

AUTHORITY

- Elements. Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined. Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined. Pen. Code, § 288(f)(3).
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Elder Defined. See Pen. Code, § 368(g).
- Menace Defined. See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. See *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching With Intent to Arouse. See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Dependent Person Touching Own Body Parts at Defendant's Instigation. See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined. See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37, 41–46.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iv], [v], [b]–[d] (Matthew Bender).

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The Court of Appeal has held that the definition of "force" as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra,* 33 Cal.4th at pp. 1026–1028.) It would seem that this definition of "force" would also apply to the crime of lewd acts with a dependant person, under Penal Code section 288(b) subsection (2).

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v.*

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Pitmon (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Dependent Person. Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person. Pen. Code, §§ 664, 288(b)(2).
- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242.

RELATED ISSUES

Developmental Disability

If the dependent person has a developmental disability, arguably there is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation of disabled person].)

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1061–1069. Reserved for Future Use

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B. AGAINST MINORS ONLY

(i) Unlawful Sexual Intercourse

1070. Unlawful Sexual Intercourse: Defendant 21 or Older

The defendant is charged [in Count ____] with having unlawful sexual intercourse with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with another person;**
2. **The defendant and the other person were not married to each other at the time of the intercourse;**
3. **The defendant was at least 21 years old at the time of the intercourse;**

AND

4. **The other person was under the age of 16 years at the time of the intercourse.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the intercourse.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other

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person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 261.5(a) & (d).
- Minor's Consent Not a Defense. *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P. 502].
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 45–46.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 20–24.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Unlawful Sexual Intercourse. Pen. Code, §§ 664, 261.5; see, e.g., *People v. Nicholson* (1979) 98 Cal.App.3d 617, 622–624 [159 Cal.Rptr. 766].

Contributing to the delinquency of a minor (Pen. Code, § 272) is not a lesser included offense of unlawful sexual intercourse. (*People v. Bobb* (1989) 207 Cal.App.3d 88, 93–96 [254 Cal.Rptr. 707], disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

RELATED ISSUES

Calculating Age

The "birthday rule" of former Civil Code section 26 (now see Fam. Code, § 6500) applies. A person attains a given age as soon as the first minute of his or her birthday has begun, not on the day before the birthday. (*In re Harris* (1993) 5 Cal.4th 813, 844–845, 849 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Participant Must be Over 21

One of the two participants in the act of unlawful sexual intercourse must be over 21 and the other person must be under 16. Proof that an aider and abettor was over 21 is insufficient to sustain the aider and abettor's conviction if neither of the actual participants was over 21 years old. (See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 513, 515 [217 Cal.Rptr. 347] [applying same argument to section 288a(c), where perpetrator must be 10 years older than victim under 14].)

Mistaken Belief About Victim's Age

A defendant is not entitled to a mistake of fact instruction if he claims that he believed that the complaining witness was over 16. His belief would still constitute the *mens rea* of intending to have sex with a minor. (*People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70].) However, if he claims that he believed that the complaining witness was over 18 years old, he is entitled to the mistake of fact instruction. (See

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People v. Hernandez (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].)

Married Minor Victim

A defendant may be convicted of unlawful sexual intercourse even if the minor victim is married or was previously married to another person. (*People v. Courtney* (1960) 180 Cal.App.2d 61, 62 [4 Cal.Rptr. 274] [construing former statute]; *People v. Caldwell* (1967) 255 Cal.App.2d 229, 230–231 [63 Cal.Rptr. 63].)

Sterility

Sterility is not a defense to unlawful sexual intercourse. (*People v. Langdon* (1987) 192 Cal.App.3d 1419, 1421 [238 Cal.Rptr. 158].)

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1071. Unlawful Sexual Intercourse: Minor More Than Three Years Younger

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The defendant is charged [in Count ____] with unlawful sexual intercourse with a minor who was more than three years younger than the defendant.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with another person;**
2. **The defendant and the other person were not married to each other at the time of the intercourse;**

AND

3. **At the time of the intercourse, the other person was under the age of 18 and more than three years younger than the defendant.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the intercourse.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rprtr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 261.5(a) & (c).
- Minor's Consent Not a Defense. *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].
- Mistake of Fact Regarding Age. *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; see *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089 [115 Cal.Rptr. 528] [belief about age is a defense], disapproved on other grounds in *People v. Freeman* (1988) 46 Cal.3d 419, 428, fn. 6 [250 Cal.Rptr. 598, 758 P.2d 1128].
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 45–46.

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2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 20–24.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Unlawful Sexual Intercourse. Pen. Code, §§ 664, 261.5; see, e.g., *People v. Nicholson* (1979) 98 Cal.App.3d 617, 622–624 [159 Cal.Rptr. 766].

Contributing to the delinquency of a minor (Pen. Code, § 272) is not a lesser included offense of unlawful sexual intercourse. (*People v. Bobb* (1989) 207 Cal.App.3d 88, 93–96 [254 Cal.Rptr. 707], disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

RELATED ISSUES

Minor Perpetrator

The fact that a minor may be a victim does not exclude a minor from being charged as a perpetrator. (*In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364 [73 Cal.Rptr.2d 331] [construing Pen. Code, § 261.5(b)].) There is no privacy right among minors to engage in consensual sexual intercourse. (*Id.* at p. 1361.) However, a minor victim of unlawful sexual intercourse cannot be held liable as an aider and abettor, a coconspirator, or an accomplice. (*In re Meagan R.* (1996) 42 Cal.App.4th 17, 25 [49 Cal.Rptr.2d 325].)

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

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1072. Misdemeanor Unlawful Sexual Intercourse: Minor Within Three Years of Defendant's Age

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The defendant is charged [in Count ____] with unlawful sexual intercourse with a minor whose age was within three years of the defendant's age.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with another person;**
2. **The defendant and the other person were not married to each other at the time of the intercourse;**

AND

3. **At the time of the intercourse, the other person was under the age of 18 but not more than three years (younger/older) than the defendant.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the intercourse.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [32 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [57 Cal.Rptr. 735].)

AUTHORITY

- Elements of Misdemeanor Offense. Pen. Code, § 261.5(a) & (b).
- Minor's Consent Not a Defense. *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].
- Mistake of Fact Regarding Age. *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 31, 393 P.2d 673]; see *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089 [115 Cal.Rptr. 528] [belief about age is a defense], disapproved on other grounds in *People v. Freeman* (1988) 46 Cal.3d 419, 428, fn. 6 [250 Cal.Rptr. 598, 758 P.2d 1128].
- Sexual Intercourse Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1161].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 45–46.

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2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 20–24.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Unlawful Sexual Intercourse. Pen. Code, §§ 664, 261.5; see, e.g., *People v. Nicholson* (1979) 98 Cal.App.3d 617, 622–624 [159 Cal.Rtpr. 707].

Contributing to the delinquency of a minor (Pen. Code, § 272) is not a lesser included offense of unlawful sexual intercourse. (*People v. Bobb* (1989) 207 Cal.App.3d 88, 93–96 [254 Cal.Rptr. 707], disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*, and CALCRIM No. 1071, *Unlawful Sexual Intercourse: Minor More Than Three Years Younger.*

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(ii) Oral Copulation

1080. Oral Copulation With Person Under 14

The defendant is charged [in Count ____] with oral copulation of a person who was under the age of 14 and at least 10 years younger than the defendant.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of oral copulation with another person;**

AND

2. **At the time of the act, the other person was under the age of 14 and was at least 10 years younger than the defendant.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 288a(c)(1).
- Oral Copulation Defined. Pen. Code, § 288a(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation With Minor Under 14. Pen. Code, §§ 664, 288a(c)(1).
- Oral Copulation With Minor Under 18. *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199].

RELATED ISSUES

Mistake of Fact Defense Not Available

In *People v. Olsen* (1984) 36 Cal.3d 638, 649 [205 Cal.Rptr. 492, 685 P.2d 52], the court held that the defendant's mistaken belief that the victim was over 14 was no defense to a charge of lewd and lascivious acts with a child under 14.

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1081. Oral Copulation With Minor: Defendant 21 or Older

The defendant is charged [in Count ____] with engaging in an act of oral copulation with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of oral copulation with another person;**
2. **The defendant was at least 21 years old at the time of the act;**

AND

3. **The other person was under the age of 16 years at the time of the act.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 288a(b)(2).
- Oral Copulation Defined. Pen. Code, § 288a(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation With Minor When Defendant Over 21. Pen. Code, §§ 664, 288a(b)(2).

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- Oral Copulation With Minor Under 18. See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of section 288a(c)].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

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1082. Oral Copulation With Person Under 18

The defendant is charged [in Count ____] with oral copulation with a person who was under the age of 18.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of oral copulation with another person;**

AND

2. **The other person was under the age of 18 when the act was committed.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 288a(b)(1).
- Oral Copulation Defined. Pen. Code, § 288a(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Mistake of Fact Regarding Age. *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673] [in context of statutory rape]; *People v. Peterson* (1981) 126 Cal.App.3d 396, 397 [178 Cal.Rptr. 734].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 46.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][c], [3][b], 142.23[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation With Minor. Pen. Code, §§ 664, 288a(b)(1).

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RELATED ISSUES

Minor Perpetrator

A minor under age 14 may be adjudged responsible for violating Penal Code section 288a(b)(1) upon clear proof of the minor's knowledge of wrongfulness. (Pen. Code, § 26; *In re Paul C.* (1990) 221 Cal.App.3d 43, 49 [270 Cal.Rptr. 369].)

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

(New January 2006)

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(iii) Sodomy

1090. Sodomy With Person Under 14

The defendant is charged [in Count ____] with sodomy with a person who was under the age of 14 years and at least 10 years younger than the defendant.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sodomy with another person;**

AND

2. **At the time of the act, the other person was under the age of 14 years and was at least 10 years younger than the defendant.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 286(c)(1).
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1928) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25–27.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy With Minor Under 14. Pen. Code, §§ 664, 286(c)(1).
- Sodomy With Minor Under 18. See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of Pen. Code, § 288a(c)].

RELATED ISSUES

Mistake of Fact Defense Not Available

In *People v. Olsen* (1984) 36 Cal.3d 638 [205 Cal.Rptr. 492, 685 P.2d 52], the court held that the defendant's mistaken belief that the victim was over 14 was no defense to a charge of lewd and lascivious acts with a child under 14.

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1091. Sodomy With Minor: Defendant 21 or Older

The defendant is charged [in Count ____] with engaging in an act of sodomy with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sodomy with another person;**
2. **The defendant was at least 21 years old at the time of the act;**

AND

3. **The other person was under the age of 16 years at the time of the act.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rtpr.2d 361, 393 P.2d 673].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 286(b)(2).
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25–27.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][b], [3][b], 142.23[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy With Minor When Defendant Over 21. Pen. Code, §§ 664, 286(b)(2).

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- Sodomy With Minor Under 18. See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rtpr. 199] [both in context of Pen. Code, § 288a(c)].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

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1092. Sodomy With Person Under 18

The defendant is charged [in Count ____] with sodomy with a person who was under the age of 18.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sodomy with another person;**

AND

2. **The other person was under the age of 18 years at the time of the act.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 286(b)(1).
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Mistake of Fact Regarding Age. See *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]; *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673] [in context of statutory rape]; *People v. Peterson* (1981) 126 Cal.App.3d 396, 397 [178 Cal.Rptr. 734] [in context of oral copulation with minor].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25–27.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][b], [3][d], 142.23[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sodomy of Minor. Pen. Code, §§ 664, 286(b)(1).

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RELATED ISSUES

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*. and CALCRIM No. 1071, *Unlawful Sexual Intercourse: Minor More Than Three Years Younger*.

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(iv) Sexual Penetration

1100. Sexual Penetration With Person Under 14

The defendant is charged [in Count ____] with sexual penetration with a person who was under the age of 14 and at least 10 years younger than the defendant.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

AND

3. **At the time of the act, the other person was under the age of 14 years and was at least 10 years younger than the defendant.**

Sexual penetration **means (penetration, however slight, of the genital or anal openings of another person/ [or] causing another person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, no matter how slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[It is not a defense that the other person may have consented to the act.]

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 371, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 289(j).
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 48.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [3][b] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempted Sexual Penetration With Minor Under 14. Pen. Code, §§ 664, 289(j).
- Sexual Penetration With Minor Under 18. See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of oral copulation with minor under 14].

RELATED ISSUES

Mistake of Fact Defense Not Available

In *People v. Olsen* (1984) 36 Cal.3d 638, 649 [205 Cal.Rptr. 492, 685 P.2d 52], the court held that the defendant's mistaken belief that the victim was over 14 was no defense to a charge of lewd and lascivious acts with a child under 14.

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1101. Sexual Penetration With Minor: Defendant 21 or Older

The defendant is charged [in Count ____] with participating in an act of sexual penetration with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sexual penetration with another person;**
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**
3. **The defendant was at least 21 years old at the time of the act;**

AND

4. **The other person was under the age of 16 years at the time of the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal openings of another person/ [or] causing another person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, no matter how slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[It is not a defense that the other person may have consented to the act.]

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 289(i).
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235]

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[penetration of genital opening refers to penetration of labia majora, not the vagina].

- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Minor's Consent Not a Defense. See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 48.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][d], [3][b], 142.23[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sexual Penetration With Minor When Defendant Over 21. Pen. Code, §§ 664, 289(i).
- Sexual Penetration With Minor Under 18. See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of Pen. Code, § 288a(c)].

RELATED ISSUES

See the Related Issues section under CALCRIM 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

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1102. Sexual Penetration With Person Under 18

The defendant is charged [in Count ____] with sexual penetration with a person who was under the age of 18.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant participated in an act of sexual penetration with another person**;
2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

AND

3. **The other person was under the age of 18 years at the time of the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal openings of another person/ [or] causing another person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, no matter how slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[It is not a defense that the other person may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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<Defense: Good Faith Belief 18 or Over>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. Pen. Code, § 289(h).
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].

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- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Minor's Consent Not a Defense. *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Mistake of Fact Regarding Age. See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673] [in context of statutory rape]; *People v. Peterson* (1981) 126 Cal.App.3d 396, 397 [178 Cal.Rptr. 734] [in context of oral copulation with minor].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 46.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 48.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][d], [3][b], 142.23[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Sexual Penetration With Minor. Pen. Code, §§ 664, 289(h).

RELATED ISSUES

Forcible Self-Penetration

In a prosecution under Penal Code section 289(a), one court has held that forcible self-penetration comes within the ambit of the statute. (*People v. Keeney* (1994) 24 Cal.App.4th 886, 889 [29 Cal.Rptr.2d 451].) *Keeney* was construing Penal Code section 289(k)(1). Section 289(h), governing penetration with a minor, requires that the perpetrator "participate in [the] act." Until this issue is clarified by the appellate courts, the definition of self-penetration in this instruction excludes forcible self-penetration.

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*, and CALCRIM No. 1071, *Unlawful Sexual Intercourse: Minor More Than Three Years Younger.*

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(v) Lewd And Lascivious Act

1110. Lewd or Lascivious Act: Child Under 14 Years

The defendant is charged [in Count ____] with committing a lewd or lascivious act on a child under the age of 14 years.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—defendant touched child>

[1A. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;]

[OR]

<Alternative 1B—child touched defendant>

[1B. The defendant willfully caused a child to touch (his/her) own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;]

2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;

AND

3. The child was under the age of 14 years at the time of the act.

The touching need not be done in a lewd or sexual manner.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

[It is not a defense that the child may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

In element 1, give alternative 1A if the prosecution alleges that the defendant touched the child. Give alternative 1B if the prosecution alleges that the defendant cause the child to do the touching.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Give the bracketed paragraph that begins with "It is not a defense that the child," on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 288(a).
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr. 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 2552] [list of examples].
- Child's Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].

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- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–40, 44–46.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][i], [b]–[d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Child Under 14. Pen. Code, §§ 664, 288(a); *People v. Imler* (1992) 9 Cal.App.4th 1178, 1181–1182 [11 Cal.Rptr.2d 915]; *People v. Herman* (2002) 97 Cal.App.4th 1369, 1389–1390 [119 Cal.Rptr.2d 199].
- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242.

Annoying or molesting a child under the age of 18 (Pen. Code, § 647.6) is not a lesser included offense of section 288(a). (*People v. Lopez* (1998) 19 Cal.4th 282, 290, 292 [79 Cal.Rptr.2d 195, 965 P.2d 713].)

RELATED ISSUES

Any Act That Constitutes Sexual Assault

A lewd or lascivious act includes any act that constitutes a crime against the person involving sexual assault as provided in title 9 of part 1 of the Penal Code (Pen. Code, §§ 261–368). (Pen. Code, § 288(a).) For example, unlawful sexual intercourse on the body of a child under 14 can be charged as a lewd act under section 288 and as a separate offense under section 261.5. However, these charges are in the alternative and, in such cases, the court has a **sua sponte** duty to give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*. (See Pen. Code,

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§ 654(a); *People v. Nicholson* (1979) 98 Cal.App.3d 617, 625 [159 Cal.Rptr. 766].)

Calculating Age

The "birthday rule" of former Civil Code section 26 (now see Fam. Code, § 6500) applies so that a person attains a given age as soon as the first minute of his or her birthday has begun, not on the day before the birthday. (See *In re Harris* (1993) 5 Cal.4th 813, 844–845, 849 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Minor Perpetrator

A minor under age 14 may be convicted for violating Penal Code section 288(a) on clear proof of the minor's knowledge of wrongfulness and the minor's intent to arouse his or her own sexual desires. (See Pen. Code, § 26; *In re Randy S.* (1999) 76 Cal.App.4th 400, 406–408 [90 Cal.Rptr.2d 423]; see also *In re Paul C.* (1990) 221 Cal.App.3d 43, 49 [270 Cal.Rptr. 369] [in context of oral copulation].) The age of the minor is a factor to consider when determining if the conduct was sexually motivated. (*In re Randy S., supra,* 76 Cal.App.4th at pp. 405–406 [90 Cal.Rptr.2d 423].)

Solicitation to Violate Section 288

Asking a minor to engage in lewd conduct with the person making the request is not punishable as solicitation of a minor to commit a violation of Penal Code section 288. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1379 [119 Cal.Rptr.2d 199] [conviction for solicitation under Penal Code section 653f(c) reversed].) "[A] minor cannot violate section 288 by engaging in lewd conduct with an adult." (*Id.* at p. 1379.)

Mistaken Belief About Victim's Age

A defendant charged with a lewd act on a child under Penal Code section 288(a) is not entitled to a mistake of fact instruction regarding the victim's age. (*People v. Olsen* (1984) 36 Cal.3d 638, 647 [205 Cal.Rptr. 492, 685 P.2d 52] [adult defendant]; *In re Donald R.* (1993) 14 Cal.App.4th 1627, 1629–1630 [18 Cal.Rptr.2d 442] [minor defendant].)

Multiple Lewd Acts

Each individual act that meets the requirements of section 288 can result in a new and separate statutory violation. (*People v. Scott* (1994) 9 Cal.4th 331, 346–347 [36 Cal.Rptr.2d 627, 885 P.2d 1040]; see *People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [256 Cal.Rptr. 401, 768 P.2d 1078] [in

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context of sexual penetration].) For example, if a defendant fondles one area of a victim's body with the requisite intent and then moves on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the two be separated by a hiatus or period of reflection. (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456 [121 Cal.Rptr.2d 426].)

(New January 2006)

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1111. Lewd or Lascivious Act: By Force or Fear

The defendant is charged [in Count ____] with a lewd or lascivious act by force or fear on a child under the age of 14 years.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—defendant touched child>

[1A. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;]

[OR]

<Alternative 1B—child touched defendant>

[1B. The defendant willfully caused a child to touch (his/her) own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;]

2. In committing the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the child or someone else;

3. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;

AND

4. The child was under the age of 14 years at the time of the act.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

The *force* used must be substantially different from or substantially greater than the force needed to accomplish the act itself.

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person

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to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is accomplished by *fear* if the child is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

[It is not a defense that the child may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

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Defenses-Instructional Duty

There is disagreement as to whether knowing consent by a minor is an affirmative defense to a lewd act accomplished by force. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero, supra,* 157 Cal.App.3d at pp. 487–488 [204 Cal.Rptr. 582], dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) The bracketed paragraph that begins with "It is not a defense that the child" may be given on request if there is evidence of consent and the court concludes that consent is not a defense to a charge under section 288(b)(1). If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.)

AUTHORITY

- Elements. Pen. Code, § 288(b)(1).
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Menace Defined. Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].

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- Force Defined. *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–38.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, Crimes *Against the Person*, § 142.21[1][a][ii], [b]–[d] (Matthew Bender).

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The definition of "force" as used in Penal Code section 288(b)(1) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra,* 33 Cal.4th at pp. 1026–1028.)

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The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

LESSER INCLUDED OFFENSES

- Attempted Lewd Act by Force With Child Under 14. Pen. Code, §§ 664, 288(b).
- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242.

RELATED ISSUES

Evidence of Duress

In looking at the totality of the circumstances to determine if duress was used to commit forcible lewd acts on a child, "relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. . . . The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*People v. Cochran, supra,* 103 Cal.App.4th at p. 14.)

See the Related Issues section of the Bench Notes for CALCRIM No. 1110, *Lewd or Lascivious Act: Child Under 14 Years.*

(New January 2006)

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1112. Lewd or Lascivious Act: Child 14 or 15 Years

The defendant is charged [in Count ____] with a lewd or lascivious act on a 14- or 15-year-old child who was at least 10 years younger than the defendant.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—defendant touched child>

[1A. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;]

[OR]

<Alternative 1B—child touched defendant>

[1B. The defendant willfully caused a child to touch (his/her) own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;]

2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;

3. The child was (14/15) years old at the time of the act;

AND

4. When the defendant acted, the child was at least 10 years younger than the defendant.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

[It is not a defense that the child may have consented to the act.]

[In determining whether a person is at least 10 years older than a child, measure from the person's birthdate to the child's birthdate.]

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Give the bracketed paragraph that begins with "It is not a defense that the child," on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraphs about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr. 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 288(c)(1).
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].

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- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Minor's Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].
- Mistaken Belief About Victim's Age Not a Defense. *People v. Paz* (2000) 80 Cal.App.4th 293, 298 [95 Cal.Rptr.2d 166].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–40, 44–46.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iii], [b]–[d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section of the Bench Notes for CALCRIM No. 1110, *Lewd or Lascivious Act: Child Under 14 Years*.

(New January 2006)

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(vi) Other Offenses

1120. Continuous Sexual Abuse

The defendant is charged [in Count ____] with continuous sexual abuse of a child under the age of 14 years.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (lived in the same home with/ [or] had recurring access to) a minor child;**
2. **The defendant engaged in three or more acts of (substantial sexual conduct/ [or] lewd or lascivious conduct) with the child;**
3. **Three or more months passed between the first and last acts;**

AND

4. **The child was under the age of 14 years at the time of the acts.**

[*Substantial sexual conduct* means oral copulation or masturbation of either the child or the perpetrator, or penetration of the child's or perpetrator's vagina or rectum by (the other person's penis/ [or] any foreign object).]

[*Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.]

[*Lewd or lascivious conduct* is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched.] [*Lewd or lascivious conduct* [also] includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent.]

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[Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.]

You cannot convict the defendant unless all of you agree that (he/she) committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or child is not required for lewd or lascivious conduct.]

[It is not a defense that the child may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the court gives the definition of "lewd and lascivious conduct," the definition of "willfully" must also be given.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Give the bracketed paragraph that begins with "It is not a defense that the child," on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 288.5(a); *People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287 [59 Cal.Rptr.2d 389].

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- Substantial Sexual Conduct Defined. Pen. Code, § 1203.066(b).
- Unanimity on Specific Acts Not Required. Pen. Code, § 288.5(b); *People v. Adames* (1997) 54 Cal.App.4th 198, 208 [62 Cal.Rptr.2d 631].
- Actual Arousal Not Required. *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child Touching Own Body Parts at Defendant's Instigation. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Minor's Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 884] [dicta in context of lewd or lascivious act].
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884]; see Pen. Code, § 288a(a).
- "Recurring Access" Is Commonly Understand Term Not Requiring Sua Sponte Definitional Instruction. *People v. Rodriguez* (2002) 28 Cal.4th 543, 550 [122 Cal.Rptr.2d 348, 49 P.3d 1085] [disapproving *People v. Gohdes* (1997) 58 Cal.App.4th 1520, 1529 [68 Cal.Rptr.2d 719].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 51–53.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][c][ii], [2] (Matthew Bender).

COMMENTARY

Penal Code section 288.5 does not require that the defendant reside with, or have access to, the child continuously for three consecutive months. It only requires that a period of at least three months passes between the first and last acts of molestation. (*People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287 [59 Cal.Rptr.2d 389].)

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Section 288.5 validly defines a prohibited offense as a continuous course of conduct and does not unconstitutionally deprive a defendant of a unanimous jury verdict. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309–1312 [18 Cal.Rptr.2d 389].)

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.
- Simple Battery. Pen. Code, § 242.

Since a conviction under Penal Code section 288.5 could be based on a course of substantial sexual conduct without necessarily violating section 288 (lewd or lascivious conduct), the latter is not necessarily included within the former and no sua sponte instruction is required. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1313–1314 [18 Cal.Rptr.2d 511]; see *People v. Palmer* (2001) 86 Cal.App.4th 440, 444–445 [103 Cal.Rptr.2d 301].)

RELATED ISSUES

Alternative Charges

Under Penal Code section 288.5(c), continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative. In these circumstances, multiple convictions are precluded. (*People v. Johnson* (2002) 28 Cal.4th 240, 245, 248 [121 Cal.Rptr.2d 197, 47 P.3d 1064] [exception to general rule in Pen. Code, § 954 permitting joinder of related charges].) In such cases, the court has a **sua sponte** duty to give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*. If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses and a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse. (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1060 [126 Cal.Rptr.2d 92].)

Masturbation

For a discussion of the term masturbation, see *People v. Chambless* (1999) 74 Cal.App.4th 773, 783–784, 786–787 [88 Cal.Rptr.2d 444] [construing term for purposes of finding defendant committed sexually violent offenses under the Sexually Violent Predators Act].

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1121. Annoying or Molesting a Child in a Dwelling

The defendant is charged [in Count ____] with annoying or molesting a child in an inhabited dwelling.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant entered an inhabited (dwelling house/part of a building/trailer coach) without consent;**
2. **After entering the (house/building/trailer coach), the defendant engaged in conduct directed at a child;**
3. **A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct;**
4. **The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child;**

AND

5. **The child was under the age of 18 years at the time of the conduct.**

[It is not necessary that the child actually be irritated or disturbed.] [It is [also] not necessary that the child actually be touched.]

[It is not a defense that the child may have consented to the act.]

[A (house/part of a building/trailer coach) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged conduct.]

[A (house/part of a building/trailer coach) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (house/part of a building/trailer coach) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *house* includes any (structure/garage/office/_____ <*insert other description*>) that is attached to the house and functionally connected with it.]

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[A *trailer coach* is a vehicle without its own mode of power, designed to be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

[A *trailer coach* is [also] a park trailer that is intended for human habitation for recreational or seasonal use only and

(1) has a floor area of no more than 400 square feet;

(2) is not more than 14 feet wide;

(3) is built on a single chassis;

AND

(4) may be transported on public highways only with a permit.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief Over 18>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the child was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643]; *People v. Epps* (1981) 122 Cal.App.3d 691, 703–704 [176 Cal.Rptr. 332].) However, child annoyance or molestation may be committed by a single act or a repetitive course of conduct. There is no sua sponte duty to give a unanimity instruction when a defendant's conduct clearly constituted a

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single course of conduct. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014–1016 [230 Cal.Rptr. 237].) The court must determine if a unanimity instruction is required and whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with a prior conviction for a violation of Penal Code section 647.6 or any other specified sexual offense (see Pen. Code, § 647.6(c)), give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr.2d 21]; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076].)

Give the bracketed sentence that begins, "It is not a defense that," on request if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

If appropriate, give any of the bracketed definitions of "inhabited," "house" or "trailer coach" on request.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 21 Cal.Rptr.2d 373, 855 P.2d 391].)

If the defendant was charged with simple annoying or molesting a child without any allegations about entering an inhabited house, building, or trailer coach, do not give this instruction. Give CALCRIM No. 1122, *Annoying or Molesting a Child*.

Do **not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227 [38 Cal.Rptr.2d 335].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably believed that the child was over 18 years of age, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Atchison* (1978) 22 Cal.3d 181, 183 [148 Cal.Rptr. 881, 583 P.2d 735]; *People v. Paz* (2000) 80 Cal.App.4th 293, 300 [95 Cal.Rptr.2d 166].)

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AUTHORITY

- Elements. Pen. Code, § 647.6(a)–(c).
- Inhabitation Defined. See Pen. Code, § 459 [in context of burglary].
- Trailer Coach Defined. Veh. Code, § 635; Health & Saf. Code, § 18009.3.
- Acts Motivated by Unnatural or Abnormal Sexual Interest. *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335]; *In re Gladys R.* (1970) 1 Cal.3d 855, 867 [83 Cal.Rptr. 671, 464 P.2d 127].
- Annoy and Molest Defined; Objective Standard. *People v. Lopez* (1998) 19 Cal.4th 282, 289–290 [79 Cal.Rptr.2d 195]; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1750 [37 Cal.Rptr.2d 327]; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901–902 [246 P.2d 173].
- Lewd Act Not Required. *People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466 [253 Cal.Rptr. 564].
- Minor's Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta, in context of lewd act].
- Minor Need Not Actually Be Annoyed. *People v. Lopez* (1998) 19 Cal.4th 282, 290 [79 Cal.Rptr.2d 195, 965 P.2d 713].
- Actual Touching Not Required. *People v. Memro* (1995) 11 Cal.4th 786, 871 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; *People v. Lopez* (1998) 19 Cal.4th 282, 289 [79 Cal.Rptr.2d 195].
- House Not Inhabited If Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 59, 60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[4], 142.23[2] (Matthew Bender).

COMMENTARY

See the Commentary section of the Bench Notes for CALCRIM No. 1122, *Annoying or Molesting a Child.*

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LESSER INCLUDED OFFENSES

- Attempted Annoying or Molesting of Minor. Pen. Code, §§ 664, 647.6(b).

Annoying or molesting a child without entering an inhabited dwelling is a misdemeanor and lesser included offense. (Pen. Code, § 647.6(a).)

Neither simple assault (*People v. Greene* (1973) 34 Cal.App.3d 622, 654–655 [110 Cal.Rptr. 160]) or contributing to the delinquency of a minor (*People v. Romero* (1975) 48 Cal.App.3d 752, 757 [121 Cal.Rptr. 800] [construing former versions of Pen. Code, §§ 272 and 647.6]) is a necessarily included lesser offense of annoying or molesting a child.

RELATED ISSUES

After Entering

The statute does not require that the defendant engage in the molesting conduct while still in the home. (*People v. Mendoza* (2004) 118 Cal.App.4th 571, 575–576 [13 Cal.Rptr.3d 195].) It is sufficient if the defendant engaged in the conduct after entering the home and there is a "nexus between the residential entry and the molesting conduct." (*Id.* at p. 576.)

See the Related Issues section of the Bench Notes for CALCRIM No. 1122, *Annoying or Molesting a Child*.

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1122. Annoying or Molesting a Child

The defendant is charged [in Count ____] with annoying or molesting a child.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant engaged in conduct directed at a child;**
2. **A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct;**
3. **The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child;**

AND

4. **The child was under the age of 18 years at the time of the conduct.**

[It is not necessary that the child actually be irritated or disturbed.] [It is [also] not necessary that the child actually be touched.]

[It is not a defense that the child may have consented to the act.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief Over 18>

[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the child was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643]; *People v. Epps* (1981) 122 Cal.App.3d 691, 703–704 [176 Cal.Rptr. 237].) However, child annoyance or molestation may be committed by either a single act or a repetitive course of conduct. There is no sua sponte duty to give a unanimity instruction when a defendant's conduct clearly constituted a single course of conduct. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014–1016 [230 Cal.Rptr. 237].) The court must determine if a unanimity instruction is required and whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with a prior conviction for a violation of Penal Code section 647.6 or any other specified sexual offense (see Pen. Code, § 647.6(c)), give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr.2d 21]; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076].)

Give the bracketed paragraph that begins with "It is not a defense that the child," on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

If the defendant was charged with annoying or molesting a child after entering an inhabited house, building, or trailer coach, do not give this instruction. Give CALCRIM No. 1121, *Annoying or Molesting a Child in a Dwelling*.

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Do **not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of the crime. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227 [38 Cal.Rptr.2d 335].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably believed that the child was over 18 years of age, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Atchison* (1978) 22 Cal.3d 181, 183 [148 Cal.Rptr. 881, 583 P.2d 735]; *People v. Paz* (2000) 80 Cal.App.4th 293, 300 [95 Cal.Rptr.2d 166].)

AUTHORITY

- Elements. Pen. Code, § 647.6(a)–(c).
- Acts Motivated by Unnatural or Abnormal Sexual Interest. *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227 [38 Cal.Rptr.2d 335]; *In re Gladys R.* (1970) 1 Cal.3d 855, 867 [83 Cal.Rptr. 671, 464 P.2d 127].
- Annoy and Molest Defined; Objective Standard. *People v. Lopez* (1998) 19 Cal.4th 282, 289–290 [79 Cal.Rptr.2d 195, 9656 P.2d 713]; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1750 [37 Cal.Rptr.2d 327]; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901–902 [246 P.2d 173].
- Lewd Act Not Required. *People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466 [253 Cal.Rptr. 564].
- Minor's Consent Not a Defense. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta, in context of lewd act].
- Minor Need Not Actually Be Annoyed. *People v. Lopez* (1998) 19 Cal.4th 282, 290 [79 Cal.Rptr.2d 195, 965 P.2d 713].
- Actual Touching Not Required. *People v. Memro* (1995) 11 Cal.4th 786, 871 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; *People v. Lopez* (1998) 19 Cal.4th 282, 289 [79 Cal.Rptr.2d 195, 965 P.2d 713].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 59, 60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[4], 142.23[2] (Matthew Bender).

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COMMENTARY

"Annoy" and "molest" are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. (*People v. Lopez* (1998) 19 Cal.4th 282, 289 [79 Cal.Rptr.2d 195, 965 P.2d 713]; *People v. Carskaddon* (1957) 49 Cal.2d 423, 426 [318 P.2d 4].) "Annoy means to disturb or irritate, especially by continued or repeated acts . . . . [¶] '[M]olest' [means] . . . 'to interfere with or meddle with unwarrantably so as to injure or disturb.' " (*People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901 [246 P.2d 173].) A photographer can "annoy" a minor by taking the minor's photograph in a public place in an offensive and irritating manner. (See *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1325 [105 Cal.Rptr.2d 320].) A lewd act is not required. (*People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466 [253 Cal.Rptr. 564].)

LESSER INCLUDED OFFENSES

- Attempted Annoying or Molesting of Minor. Pen. Code, §§ 664, 647.6(a).

Annoying or Molesting a minor is a misdemeanor unless the defendant is charged with one of the specified prior convictions. (Pen. Code, § 647.6(a).) If the defendant is charged with a felony based on a qualifying prior conviction, the misdemeanor is a lesser included offense.

Neither simple assault (*People v. Greene* (1973) 34 Cal.App.3d 622, 654–655 [110 Cal.Rptr. 160]) or contributing to the delinquency of a minor (*People v. Romero* (1975) 48 Cal.App.3d 752, 757 [121 Cal.Rptr. 800] [construing former versions of Pen. Code, §§ 272 and 647.6]) is a necessarily included lesser offense of annoying or molesting a child.

RELATED ISSUES

Minor Perpetrator

A minor under age 14 may be convicted for violating Penal Code section 647.6 on clear proof of the minor's knowledge of wrongfulness. (See Pen. Code, § 26; *In re Gladys R.* (1970) 1 Cal.3d 855, 862, 869 [83 Cal.Rptr. 671, 464 P.2d 127] [12-year-old may be declared ward of court for annoying or molesting another minor].)

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1123. Aggravated Sexual Assault of Child Under 14 Years

The defendant is charged [in Count ____] with aggravated sexual assault of a child who was under the age of 14 years and at least 10 years younger than the defendant.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed _____ <*insert sex offense specified in Pen. Code, § 269(a)(1)–(5)*> on another person;**

AND

2. **When the defendant acted, the other person was under the age of 14 years and was at least 10 years younger than the defendant.**

To decide whether the defendant committed _____ <*insert sex offense specified in Pen. Code, § 269(a)(1)–(5)*>, please refer to the separate instructions that I (will give/have given) you on that crime.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1 and in the sentence following element 2, insert the sex offense specified in Penal Code section 269(a)(1)–(5) that is charged. The sex offenses specified in section 269(a)(1)–(5) and their applicable instructions are:

1. Rape (Pen. Code, § 261(a)(2); see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*).
2. Rape or sexual penetration in concert (Pen. Code, § 264.1; see CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, and CALCRIM No. 1046, *Sexual Penetration in Concert*).

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3. Sodomy (Pen. Code, § 286(c)(2); see CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*).
4. Oral copulation (Pen. Code, § 288a(c)(2); see CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*).
5. Sexual penetration (Pen. Code, § 289(a); see CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*).

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, § 269(a).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 54.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[2][a], [c], [7][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.
- Underlying Sex Offense. Pen. Code, §§ 261(a)(2) [rape], 264.1 [rape or sexual penetration in concert], 286(c)(2) [sodomy], 288a(c)(2) [oral copulation], 289(a) [sexual penetration].

(New January 2006)

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C. OTHER SEX RELATED OFFENSES

(i) Obscene or Harmful Matter

1140. Showing or Sending Harmful Material to Seduce a Minor

The defendant is charged [in Count ____] with (showing[,]/ sending[,]/ distributing[,]/ [or] offering to show or distribute) harmful material to a minor.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (showed[,]/ sent[,]/ caused to be sent[,]/ distributed[,]/ [or] offered to show or distribute) harmful material to a minor [by (electronic mail[,]/ the Internet[,]/ [or] a commercial online service)];**
2. **When the defendant acted, (he/she) knew the character of the material;**

<Alternative 3A—Pen. Code, § 288.2(a)>

[3. When the defendant acted, (he/she) (knew the other person was a minor/ [or] failed to use reasonable care to determine the minor's actual age);]

<Alternative 3B—Pen. Code, § 288.2(b)>

[3. When the defendant acted, (he/she) knew the other person was a minor;]

4. **When the defendant acted, (he/she) intended to sexually arouse, appeal to, or gratify the lust, passions, or sexual desires of (himself/herself) or of the minor;**

[AND]

5. **When the defendant acted, (he/she) intended to seduce the minor(;/.)**

<Give element 6 when instructing on "offered to show or distribute" in element 1.>

[AND

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6. When the defendant acted, (he/she) intended to show or distribute the material to the minor.]

You must decide whether the material at issue in this case meet[s] the definition of harmful material. Material is *harmful* if, when considered as a whole:

1. It shows or describes sexual conduct in an obviously offensive way;

2. A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value for minors;

AND

3. An average adult person, applying contemporary statewide standards, would conclude it appeals to prurient interest.

A *prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

***Material,* as used in this instruction, means any (book, magazine, newspaper, video recording, or other printed or written material[;]/ [or] any picture, drawing, photograph, motion picture, or other pictorial representation[;]/ [or] any statue or other figure[;]/ [or] any recording, transcription, or mechanical, chemical, or electrical reproduction[;]/ [or] any other articles, equipment, machines, or materials). [*Material* includes live or recorded telephone messages when transmitted or distributed as part of a commercial transaction.]**

***Applying contemporary statewide standards* means using present-day standards and determining the effect of the material on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women; religious and nonreligious people; and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The *contemporary statewide standard* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community ought to accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an**

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objective determination of what would offend the statewide community as a whole.

[You may consider evidence of local community standards in deciding what the contemporary statewide standard is. However, you may not use the standard of a local community, by itself, to establish the contemporary statewide standard.]

The material is not harmful unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. When deciding whether the material is harmful, do not weigh its value against its prurient appeal.

[The depiction of nudity, by itself, does not make material harmful. In order for material containing nudity to be harmful, it must depict sexual activity and it must meet the requirements for harmful material listed above.]

[The depiction of sexual activity, by itself, does not make material harmful. In order for material depicting sexual activity to be harmful, it must meet the requirements for harmful material listed above.]

The People must prove that the defendant knew the character of the material but do not need to prove that the defendant knew whether the material met the definition of harmful material.

To seduce a minor **means to entice the minor to engage in a sexual act involving physical contact between the seducer and the minor.**

A *minor* is anyone under the age of 18. [Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[If it appears from the nature of the material or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the material must be judged based on its intended audience.]

[In deciding the material's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ presentation[,]/ sale[,]/ dissemination[,]/ distribution[,]/ publicity) indicate that the

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material was being commercially exploited because of its prurient appeal. You must determine the weight, if any, to give this evidence.]

[In deciding whether, applying contemporary statewide standards, the material appeals to a prurient interest, you may consider whether similar material is openly shown in the community. You must determine the weight, if any, to give this evidence.]

[Harmful material may be sent or distributed by live or recorded telephone messages.]

[To *distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

<Defense: Parent providing sex education>

[A parent or guardian is not guilty of this offense if he or she acted to promote legitimate sex education. The People must prove beyond a reasonable doubt that the defendant was not providing legitimate sex education. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Legitimate scientific or educational purpose>

[The defendant is not guilty of this crime if (he/she) was engaging in legitimate scientific or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate scientific or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a violation of Penal Code section 288.2(b), give the bracketed phrase "by (electronic mail[,]/ the Internet[,]/ [or] a commercial online service)" in element 1 and give alternative 3B in

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element 3. If the defendant is charged with Penal Code section 288.2(a), do not give the bracketed language in element 1 and give alternative 3A in element 3.

Give bracketed element 6 if the prosecution alleges that the defendant offered to show or distribute the material to a minor.

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Give any of the other bracketed paragraphs on request.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was "acting in aid of legitimate sex education," the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 288.2(c).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].)

If there is sufficient evidence that the defendant was engaging in legitimate scientific or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 288.2(d).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

AUTHORITY

- Elements. Pen. Code, § 288.2(a) & (b).
- Harmful Matter Defined. Pen. Code, § 313.

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- Know Character of Matter. Pen. Code, § 313(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725] [no error in instructing that it was unnecessary to establish that the accused had knowledge that material was legally obscene].
- Means of Distribution. Pen. Code, § 288.2(a) & (b).
- Contemporary Community Standards. See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498] [quoting trial court instruction].
- Seduce Defined. *People v. Jensen* (2003) 114 Cal.App.4th 224, 239–240 [7 Cal.Rptr.3d 609]; *People v. Hsu* (2000) 82 Cal.App.4th 976, 992 [99 Cal.Rptr. 2d 184].
- Prurient Interest Defined. *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229] [quoting former section 311].
- Taken or Considered as a Whole. *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct 2245, 33 L.Ed.2d 1498].
- Matter Designed for Deviant Sexual Group. Pen. Code, § 313(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].
- Commercial Exploitation Is Probative of Matter's Nature. Pen. Code, § 313(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Similar Matter Shown in Community. *In re Harris* (1961) 56 Cal.2d 879, 880 [21 Cal.Rptr.2d 373, 855 P.2d 391]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Obscenity Contrasted With Sex. *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity. *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Defense of Sex Education. Pen. Code, § 288.2(c).
- Defense of Legitimate Scientific or Educational Activity. Pen. Code, § 288.2(d).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 108.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[1][d][iii], [2][c], Ch. 144, *Crimes Against Order*, § 144.10[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Distribution of Harmful Matter to Minor. Pen. Code, §§ 664, 288.2; see, e.g., *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185 [94 Cal.Rptr.2d 453].
- Misdemeanor Distribution of Harmful Matter. Pen. Code, § 313.1(a); *People v. Jensen* (2003) 114 Cal.App.4th 224, 244 [7 Cal.Rptr.3d 609].

RELATED ISSUES

Telephone, Cable, or ISPs

A telephone corporation, a cable television company or its affiliates, an Internet service provider, or commercial online service provider does not violate section 288.2 by carrying, broadcasting, or transmitting harmful matter while providing its services. (Pen. Code, § 288.2(e).)

Expert Testimony Not Required

Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the harmful nature of the matter. (Pen. Code, § 312.1 [abrogating *In re Giannini* (1968) 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535]].)

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1141. Distributing Obscene Matter Showing Sexual Conduct by a Minor

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The defendant is charged [in Count ____] with distributing obscene matter that shows a minor engaging in sexual conduct.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—sent or brought>

[1. The defendant (sent/ [or] brought) obscene matter into California [or caused obscene matter to be (sent/ [or] brought) into California];]

<Alternative 1B—possessed>

[1. The defendant (possessed[,]/ [or] prepared[,]/ [or] published[,]/ [or] produced[,]/ [or] developed[,]/ [or] duplicated[,]/ [or] printed) obscene matter;]

<Alternative 1C—offered to distribute>

[1. The defendant offered to distribute obscene matter to someone else;]

<Alternative 1D—distributed>

[1. The defendant (distributed/ [or] showed/ [or] exchanged) obscene matter (to/with) someone else;]

2. When the defendant acted, (he/she) knew the character of the matter;

[AND]

3. When the defendant acted, (he/she) knew that the matter showed a person under the age of 18 years who was personally participating in or simulating sexual conduct(;/.)

<Give element 4 when instructing with alternative 1A, 1B or 1C; see Bench Notes>

[AND

4. When the defendant acted, (he/she) intended to (sell or distribute/distribute, show, or exchange/distribute) the

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matter to someone else [for money or other commercial benefit].]

You must decide whether the matter at issue in this case meets the definition of obscene matter. Matter is *obscene* if, when considered as a whole:

1. **It shows or describes sexual conduct in an obviously offensive way;**
2. **A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value;**

AND

3. **An average adult person, applying contemporary statewide standards, would conclude it appeals to a prurient interest.**

A *prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

***Matter* means any representation of information, data, or image, including any (film/filmstrip/photograph/negative/slide/photocopy/ videotape/video laser disc/computer hardware or software/ computer floppy disk/data storage medium/CD-ROM/computer-generated equipment/ [or] computer-generated image that contains any film or filmstrip).**

***Applying contemporary statewide standards* means using present-day standards and determining the effect of the matter on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women; religious and nonreligious people; and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The *contemporary statewide standard* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community ought to accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an objective determination of what would offend the statewide community as a whole.**

[You may consider evidence of local community standards in deciding what the contemporary statewide standard is. However,

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you may not use the standard of a local community, by itself, to establish the contemporary statewide standard.]

The material is not obscene unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. When deciding whether the material is obscene, do not weigh its value against its prurient appeal.

[Matter is not considered obscene under the law if (all persons under the age of 18 depicted in the matter are legally emancipated/ [or] it only shows lawful conduct between spouses).]

[The depiction of nudity, by itself, does not make matter obscene. In order for matter containing nudity to be obscene, it must depict sexual activity and it must meet the requirements for obscenity listed above.]

[The depiction of sexual activity, by itself, does not make matter obscene. In order for matter depicting sexual activity to be obscene, it must meet the requirements for obscenity listed above.]

***Sexual conduct* means actual or simulated (sexual intercourse/ [or] oral copulation[,]/ [or] anal intercourse[,]/ [or] anal oral copulation[,]/ [or] _____ <*insert other sexual conduct as defined in Pen. Code, § 311.4(d)(1)*>). An act is simulated when it gives the appearance of being sexual conduct.**

The People must prove that the defendant knew the obscene nature of the matter but do not need to prove that the defendant knew whether the matter met the definition of obscene.

[*To distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

[A person accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

[In deciding the matter's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ presentation[,]/ sale[,]/ dissemination[,]/ distribution[,]/ publicity) indicate that the matter

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was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

[In deciding whether the matter lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the matter showed persons under the age of 16 years engaging in sexual conduct. You must decide the weight, if any, to give this evidence.]

[In deciding whether, applying contemporary statewide standards, the matter appeals to a prurient interest, you may consider whether similar matter is openly shown in the community. You must decide the weight, if any, to give this evidence.]

[If it appears from the nature of the matter or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the matter must be judged based on its intended audience.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/ other people).]

[A person who possesses obscene matter for his or her own personal use is not guilty of this crime.]

<Defense: Legitimate scientific or educational purpose>

[The defendant is not guilty of this crime if (he/she) was engaging in legitimate medical, scientific, or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate medical, scientific, or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Law enforcement agent>

[The defendant is not guilty of this offense if (he/she) was a member [or agent] of a law enforcement or prosecuting agency and was involved in the investigation or prosecution of criminal offenses. The People have the burden of proving beyond a

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reasonable doubt that the defendant was not acting as a member [or agent] of a law enforcement or prosecuting agency. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A person is an *agent* of a law enforcement or prosecuting agency if he or she does something at the request, suggestion, or direction of a law enforcement or prosecuting agency.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, give one of the alternatives A–D depending on the charges and evidence in the case. Give element 4 when instructing with alternative 1A, 1B, or 1C. (*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604]; *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 425 P.2d 791].) When giving alternative 1A, select "sell or distribute" in element 4. When giving alternative 1B, select "distribute, show, or exchange" in element 4. When giving alternative 1C, select "distribute." Do not give element 4 with alternative 1D. No published case has held that distributing or showing obscene material requires specific intent. Give the bracketed phrase "for money or other commercial benefit" in element 4 if the defendant is charged under Penal Code section 311.2(b).

Give any of the other bracketed paragraphs on request.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, §§ 311.2(e); 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122

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Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

If there is sufficient evidence that the defendant was acting as a law enforcement agent, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 311.2(e).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].)

AUTHORITY

- Elements. Pen. Code, §§ 311.1(a), 311.2(b).
- Specific Intent to Distribute or Exhibit. *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604] [possession with intent to distribute or exhibit]; see *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28] [preparation or publication with specific intent to distribute]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 415 P.2d 791].
- Obscene Matter Defined. Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81 [127 Cal.Rptr. 317, 545 P.2d 229]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- Contemporary Community Standards. See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1298].
- Prurient Interest Defined. *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229].
- Sexual Conduct Defined. Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372.
- Person Defined. Pen. Code, § 311(c).
- Distribute Defined. Pen. Code, § 311(d).
- Knowingly Defined. Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].

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- Exhibit Defined. Pen. Code, § 311(f).
- Matter Designed for Deviant Sexual Group. Pen. Code, § 311(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].
- Commercial Exploitation Is Probative of Matter's Nature. Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Knowledge That Matter Depicts Child Under 16 Is Probative of Matter's Nature. Pen. Code, § 311(a)(3).
- Similar Matter Shown in Community. *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Exceptions to Statutory Prohibitions. Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); Pen. Code, § 311.8.
- Agent Defined. See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527] [in context of entrapment].
- Taken or Considered as a Whole. *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1298].
- Obscenity Contrasted With Nudity. *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Possessing For Personal Use Not a Crime. *Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 79–91.

7 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 310–313.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.12 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempted Distribution of Obscene Matter. Pen. Code, §§ 664, 311.1(a).
- Attempted Distribution of Obscene Matter for Commercial Consideration. Pen. Code, §§ 664, 311.2(b).

RELATED ISSUES

Advertising Obscene Matter Involving Minors

It is a felony to advertise for sale or distribution any obscene matter knowing that it depicts a minor engaged in sexual conduct. (Pen. Code, § 311.10.)

Employing or Using Minor to Pose in Film

It is a felony to employ, use, or persuade a minor to engage in or assist others in posing or modeling for the purpose of preparing a commercial or noncommercial film or other medium involving sexual conduct by a minor. (See Pen. Code, § 311.4(b), (c).) Producing child pornography and posting it on the Internet to induce others to trade such pornography without making a monetary profit satisfies the "commercial purposes" requirement of Penal Code section 311.4(b). (*People v. Cochran* (2002) 28 Cal.4th 396, 406–407 [121 Cal.Rptr.2d 595, 48 P.3d 1148].)

Excluded Conduct

Neither section 311.1 nor 311.2 applies to law enforcement and prosecuting agencies investigating or prosecuting criminal offenses, to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses. (Pen. Code, §§ 311.1(b), 311.2(e); see Pen. Code, § 311.8(a) ["defense" that act committed in aid of legitimate scientific or educational purpose].) Nor do these sections apply to depictions of a minor who is legally emancipated. (Pen. Code, §§ 311.1(c), 311.2(f); see Fam. Code, § 7000 et seq. [emancipation of minors].)

Telephone Services

A telephone corporation (see Pub. Util. Code, § 234) does not violate section 311.1 or 311.2 by carrying or transmitting messages described in these sections, or by performing related activities in providing telephone services. (Pen. Code, §§ 311.1(d), 311.2(g).)

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Expert Testimony Not Required

Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the obscene nature of the matter. (Pen. Code, § 312.1 [abrogating *In re Giannini* (1968) 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535]].)

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1142. Distributing or Intending to Distribute Obscene Material

The defendant is charged [in Count ____] with distributing obscene material.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—sent or brought>

[1. The defendant (sent/ [or] brought) obscene material into California [or caused obscene material to be (sent/ [or] brought) into California];]

<Alternative 1B—possessed>

[1. The defendant (possessed[,]/ [or] prepared[,]/ [or] published[,]/ [or] produced[,]/ [or] printed) obscene material in California;]

<Alternative 1C—offered to distribute>

[1. The defendant offered to distribute obscene material to someone else;]

<Alternative 1D—distributed>

[1. The defendant (distributed/ [or] showed) obscene material to someone else;]

[AND]

2. When the defendant acted, (he/she) knew the character of the material(;/.)

<Give element 3 when instructing with alternative 1A, 1B, or 1C; see Bench Notes.>

[AND

3. When the defendant acted, (he/she) intended to (sell or distribute/distribute or show/distribute) the material to someone else.]

You must decide whether the material at issue in this case meet[s] the definition of obscene material. Material, when considered as a whole, is *obscene* if:

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1. It shows or describes sexual conduct in an obviously offensive way;

2. A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value;

AND

3. An average adult person applying contemporary statewide standards would conclude that it appeals to a prurient interest.

A *prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

***Material* means ([[a] ((book[,]/ [or] magazine[,]/ [or] newspaper[,]/ [or] [other] printed or written material][(,/;)]/ [or] [a picture[,]/ [or] drawing[,]/ [or] photograph[,]/ [or] motion picture[,]/ [or] [other] pictorial representation][(,/;)]/ [or] [a statue or other figure][(,/;)]/ [or] [a (recording[,]/ [or] transcription[,]/ [or] mechanical, chemical, or electrical reproduction][(,/;)]/ [or any other article, equipment, or machine]). [*Material* also means live or recorded telephone messages transmitted, disseminated, or distributed as part of a commercial transaction.]**

***Applying contemporary statewide standards* means using present-day standards and determining the effect of the material on all those whom it is likely to reach within the state, in other words, its impact on the average adult person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women, religious and nonreligious people, and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The term *contemporary statewide standards* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community should accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an objective determination of what would offend the statewide community as a whole.**

[You may consider evidence of local community standards in deciding what the contemporary statewide standards are. However, you may not use the standards of a specific local

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community, by themselves, to establish the contemporary statewide standards.]

The material is not obscene unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. When deciding whether the material is obscene, do not weigh its value against its prurient appeal.

[The depiction of nudity, by itself, does not make material obscene. In order for material containing nudity to be obscene, it must depict sexual activity and must meet the requirements for obscenity listed above.]

[The depiction of sexual activity, by itself, does not make material obscene. In order for material depicting sexual activity to be obscene, it must meet the requirements for obscenity listed above.]

[Material is not considered obscene under the law if (all persons under the age of 18 years depicted in the material are legally emancipated/ [or] it only shows lawful conduct between spouses).]

The People must prove that the defendant knew the character of the material but do not need to prove that the defendant knew whether the material met the definition of obscene.

[*To distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

[A *person* accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

[In deciding the material's character and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ [or] presentation[,]/ [or] sale[,]/ [or] dissemination[,]/ [or] distribution[,]/ [or] publicity) indicate that the material was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

[In deciding whether the material lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the material showed persons under 16 years

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old engaging in sexual conduct. You must decide the weight, if any, to give this evidence.]

[In deciding whether, according to contemporary statewide standards, the material appeals to a prurient interest, you may consider whether similar material is openly shown in the statewide community. You must decide the weight, if any, to give this evidence.]

[If it appears from the character of the material or the circumstances of its distribution or showing that it is designed for a clearly defined deviant sexual group, the appeal of the material must be judged based on its intended audience.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/ other people).]

[A person who possesses obscene material for his or her own personal use is not guilty of this crime.]

<Defense: Legitimate Scientific or Educational Purpose>

[The defendant is not guilty of this crime if (he/she) was engaging in legitimate medical, scientific, or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate medical, scientific, or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Law Enforcement Agent>

[The defendant is not guilty of this crime if (he/she) was a member [or agent] of a law enforcement or prosecuting agency and was involved in the investigation or prosecution of crimes. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting as a member [or agent] of a law enforcement or prosecuting agency. If the People have not met this burden, you must find the defendant not guilty of this crime.

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[A person is an *agent* of a law enforcement or prosecuting agency if he or she does something at the request, suggestion, or direction of a law enforcement or prosecuting agency.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, give one of the alternatives 1A–1D depending on the charges and evidence in the case. Give element 3 when instructing with alternative 1A, 1B, 1C or 1D. (*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604]; *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 415 P.2d 791].) When giving alternative 1A, select "sell or distribute" in element 3. When giving alternative 1B, select "distribute or show" in element 3. When giving alternative 1C, select "distribute." Do not give element 3 with alternative 1D. No published case has held that distributing or showing obscene material requires specific intent.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, §§ 311.2(e), 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition, and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

If there is sufficient evidence that the defendant was acting as a law enforcement agent, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 311.2(e).) It is unclear who bears the burden of

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proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].)

AUTHORITY

- Elements. Pen. Code, § 311.2(a).
- Specific Intent to Distribute or Exhibit. *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604] [possession with intent to distribute or exhibit]; see *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28] [preparation or publication with specific intent to distribute]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 415 P.2d 791].
- Obscene Matter Defined. Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81 [127 Cal.Rptr. 317, 545 P.2d 229]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- Contemporary Community Standards. See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Prurient Interest Defined. *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229].
- Person Defined. Pen. Code, § 311(c).
- Distribute Defined. Pen. Code, § 311(d).
- Knowingly Defined. Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Exhibit Defined. Pen. Code, § 311(f).
- Matter Designed for Deviant Sexual Group. Pen. Code, § 311(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].
- Commercial Exploitation Is Probative of Matter's Nature. Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Knowledge That Matter Depicts Child Under 16 Is Probative of Matter's Nature. Pen. Code, § 311(a)(3).

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- Similar Matter Shown in Community. *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Exceptions to Statutory Prohibitions. Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); 311.8.
- Agent Defined. See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527] [in context of entrapment].
- Taken or Considered as a Whole. *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity. *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Possessing for Personal Use Not a Crime. *Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 79–91.

7 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 310–313.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Distribution of Obscene Matter. Pen. Code, §§ 664, 311.1(a).

RELATED ISSUES

Definition of "Sexual Conduct"

"Obscene matter" must depict or describe "sexual conduct in a patently offensive way . . . ." (Pen. Code, § 311(a).) The statute does not define

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"sexual conduct." Penal Code sections 311.4(d)(1) and 311.3(b) provide definitions of the term "sexual conduct" as used in those sections. If the court determines that a definition of "sexual conduct" is necessary, the court may wish to review those statutes. (See also *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1131 [8 Cal.Rptr.3d 372] [discussing definition of sexual conduct in prosecution for violating Pen. Code, §§ 311.3 and 311.4].)

See the Related Issues section of CALCRIM No. 1141, *Distributing Obscene Matter Showing Sexual Conduct by a Minor*.

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1143. Obscene Live Conduct

The defendant is charged [in Count ____] with (engaging or participating in[,]/ [or] managing[,]/ [or] producing[,]/ [or] sponsoring[,]/ [or] presenting or showing) obscene live conduct.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (engaged or participated in[,]/ [or] managed[,]/ [or] produced[,]/ [or] sponsored[,]/ [or] presented or showed) obscene live conduct;**
2. **The defendant knew of the character of the conduct;**

AND

3. **The obscene live conduct occurred in front of an audience of at least one person in (a public place/ [or] a place open to the public[, or a segment of the public,] or to public view).**

Live conduct **means physical activity by a person acting alone or with someone else[, including but not limited to (dancing[,]/ [or] acting[,]/ [or] simulating[,]/ [or] pantomiming[,]/ [or] singing[,]/ [or] speaking)].**

You must decide whether the conduct at issue in this case meets the definition of obscene live conduct. Live conduct, when considered as a whole, is *obscene* if:

1. **It shows or describes sexual conduct in an obviously offensive way;**
2. **A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value;**

AND

3. **An average adult person applying contemporary statewide standards would conclude it appeals to a prurient interest.**

A *prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

Applying contemporary statewide standards **means using present-day standards and determining the effect of the conduct on all**

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those whom it is likely to reach within the state, in other words, its impact on the average adult person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women, religious and nonreligious people, and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The term *contemporary statewide standards* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community should accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an objective determination of what would offend the statewide community as a whole.

[You may consider evidence of local community standards in deciding what the contemporary statewide standards are. However, you may not use the standards of a specific local community, by themselves, to establish the contemporary statewide standards.]

The conduct is not obscene unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. When deciding whether the conduct is obscene, do not weigh the value of the conduct against its prurient appeal.

[The depiction of nudity, by itself, does not make conduct obscene. In order for conduct involving nudity to be obscene, it must depict sexual activity and must meet the requirements for obscenity listed above.]

[The depiction of sexual activity, by itself, does not make conduct obscene. In order for conduct depicting sexual activity to be obscene, it must meet the requirements for obscenity listed above.]

The People must prove that the defendant knew the character of the conduct but do not need to prove that the defendant knew whether the conduct met the definition of obscene.

[A *person* accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

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[In deciding the conduct's character and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ [or] presentation[,]/ [or] advertising[,]/ [or] showing) indicate that the conduct was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

[In deciding whether the conduct lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the conduct showed persons under 16 years old engaging in sexual activities. You must decide the weight, if any, to give this evidence.]

[In deciding whether, according to contemporary statewide standards, the conduct appeals to a prurient interest, you may consider whether similar conduct is openly shown in the statewide community. You must decide the weight, if any, to give this evidence.]

[If it appears from the character of the conduct or the circumstances of its presentation or showing that it is designed for a clearly defined deviant sexual group, the appeal of the conduct must be judged based on its intended audience.]

<Defense: Legitimate Scientific or Educational Purpose>

[The defendant is not guilty of this crime if (he/she) was engaging in legitimate medical, scientific, or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate medical, scientific or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte**

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duty to instruct on that defense. (Pen. Code, § 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition, and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

AUTHORITY

- Elements. Pen. Code, § 311.6.
- Obscene Live Conduct Defined. Pen. Code, § 311(g); see *In re Giannini* (1968) 69 Cal.2d 563, 575 [72 Cal.Rptr. 655, 466 P.2d 535] [not all topless dancing obscene]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- Contemporary Community Standards. See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Prurient Interest Defined. *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229].
- Person Defined. Pen. Code, § 311(c).
- Knowingly Defined. Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Exhibit Defined. Pen. Code, § 311(f).
- Matter Designed for Deviant Sexual Group. Pen. Code, § 311(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].
- Commercial Exploitation Is Probative of Matter's Nature. Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Knowledge That Matter Depicts Child Under 16 Is Probative of Conduct's Nature. Pen. Code, § 311(g)(3).
- Similar Matter Shown in Community. *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].

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- Exceptions to Statutory Prohibitions. Pen. Code, § 311.8.
- Taken or Considered as a Whole. *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity. *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 79–91.

7 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 310–313.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.12 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 1141, *Distributing Obscene Matter Showing Sexual Conduct by a Minor* and CALCRIM No. 1142, *Distributing or Intending to Distribute Obscene Material*.

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(ii) Pimping, Pandering, Prostitution

1150. Pimping

The defendant is charged [in Count ____] with pimping.

To prove that the defendant is guilty of pimping, the People must prove that:

1. **The defendant knew that _____ <*insert name*> was a prostitute;**

[AND]

<*Alternative 2A—money earned by prostitute supported defendant*>

[2. The (money/proceeds) that _____ <*insert name*> earned as a prostitute supported defendant, in whole or in part(;/.)]

<*Alternative 2B—money loaned by house manager supported defendant*>

[2. Money that was (loaned to/advanced to/charged against) _____ <*insert name*> by a person who (kept/managed/was a prostitute at) the house or other place where the prostitution occurred, supported the defendant in whole or in part(;/.)]

<*Alternative 2C—defendant asked for payment*>

[2. The defendant asked for payment or received payment for soliciting prostitution customers for _____ <*insert name*>(;/.)]

<*Give element 3 when defendant charged with pimping a minor*>

[AND

3. _____ <*insert name*> was a minor (over the age of 16 years/under the age of 16 years) when (he/she) engaged in the prostitution.]

A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other

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compensation]. A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 2, use the appropriate alternative A–C depending on the evidence in the case.

Give element 3 if it is alleged that the prostitute was a minor. Punishment is enhanced if the minor is under the age of 16 years. (Pen. Code, § 266h(b).)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr. 373, 855 P.2d 391].)

Defenses—Instructional Duty

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

AUTHORITY

- Elements. Pen. Code, § 266h.
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].

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- General Intent Crime. *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22].
- Proof Person Is a Prostitute. *People v. James* (1969) 274 Cal.App.2d 608, 613 [79 Cal.Rptr. 182].
- Solicitation Defined. *People v. Smith* (1955) 44 Cal.2d 77, 78–80 [279 P.2d 33].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 67–69.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[2] (Matthew Bender).

COMMENTARY

Solicitation

In deciding there was sufficient evidence of solicitation, the court in *People v. Phillips* (1945) 70 Cal.App.2d 449, 453 [160 P.2d 872], quoted the following definitions:

> "[S]olicit" is defined as: "To tempt . . .; to lure on, esp. into evil, . . . to bring about . . .; to seek to induce or elicit . . . ." (Webster's New International Dictionary (2d ed.)). ". . . to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; . . . to try to obtain. . . . While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration or supplication." (58 C.J. 804–805.)

General Intent

The three ways of violating Penal Code section 266h are all general intent crimes, as held in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631 [249 Cal.Rptr. 22]:

> [D]eriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required. . . . Receiving compensation for soliciting with knowledge that the other person is a prostitute is the only requirement under the first alternative of violating section 266h by solicitation. Under the

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> second alternative to pimping by soliciting (soliciting compensation), . . . if the accused has solicited for the prostitute and has solicited compensation even though he had not intended to receive compensation, he would nevertheless be guilty of pimping. Pimping in all its forms is not a specific intent crime.

LESSER INCLUDED OFFENSES

- Attempted Pimping. Pen. Code, §§ 664, 266h; see *People v. Osuna* (1967) 251 Cal.App.2d 528, 531 [59 Cal.Rptr. 559].
- There is no crime of aiding and abetting prostitution. *People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].

RELATED ISSUES

House of Prostitution

One room of a building or other place is sufficient to constitute a house of prostitution, and one person may keep such a place to which others resort for purposes of prostitution. (*People v. Frey* (1964) 228 Cal.App.2d 33, 53 [39 Cal.Rptr. 49]; see *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 852 [78 Cal.Rptr. 736].)

Receiving Support

A conviction for living or deriving support from a prostitute's earnings does not require evidence that the defendant received money directly from the prostitute, or that the defendant used money received from the prostitution solely to pay his or her own living expenses. (*People v. Navarro* (1922) 60 Cal.App. 180, 182 [212 P. 403].)

Unanimity Instruction Not Required

Pimping is a crime "of a continuous ongoing nature and [is] therefore not subject to the requirement that the jury must agree on the specific act or acts constituting the offense." (*People v. Dell* (1991) 232 Cal.App.3d 248, 265–266 [283 Cal.Rptr. 361]; *People v. Lewis* (1978) 77 Cal.App.3d 455, 460–462 [143 Cal.Rptr. 587] [living or deriving support from prostitute's

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earnings is an ongoing continuing offense].) Proof of an ongoing relationship between the defendant and the prostitute is not required. (*People v. Jackson* (1980) 114 Cal.App.3d 207, 209–210 [170 Cal.Rptr. 476.)

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1151. Pandering

The defendant is charged [in Count ____] with pandering.

To prove that the defendant is guilty of pandering, the People must prove that:

<Alternative 1A—persuaded/procured>

[1. The defendant (persuaded/procured) _____ <*insert name*> to be a prostitute(;/.)]

<Alternative 1B—promises/threats/violence used to cause person to become prostitute>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/ induce) _____ <*insert name*> to become a prostitute(;/.)]

<Alternative 1C—arranged/procured a position>

[1. The defendant (arranged/procured a position) for _____ <*insert name*> to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]

<Alternative 1D—promises/threats/violence used to cause person to remain>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/ induce) _____ <*insert name*> to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]

<Alternative 1E—used fraud>

[1. The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) _____ <*insert name*> to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution)(;/.)]

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<Alternative 1F—received money>

[1. The defendant (received/gave/agreed to receive/agreed to give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) _____ <*insert name*> to (be a prostitute/enter or leave California for the purpose of prostitution)(;/.)]

<Give element 2 when instructing on specific intent; see Bench Notes>

[AND]

[2. The defendant intended to influence _____ <*insert name*> to be a prostitute(;/.)]

<Give element 3 when defendant charged with pandering a minor>

[AND

3. _____ <*insert name*> was (over the age of 16 years old/under the age of 16) at the time the defendant acted.]

A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that would cause a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the person's age and (her/his) relationship to the defendant.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, give the appropriate alternative A-F depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (19830 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (19750 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].)

There is a conflict in the case law about the intent required to prove pandering. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256 [219 Cal.Rptr. 693] [pandering under former § 266i(b) (now § 266i(a)(2)) requires a specific intent to influence a person to become a prostitute]; but see *People v. Montgomery, supra,* 47 Cal.App.2d at p. 16 [pandering does not necessarily involve specific intent].) The trial court must decide whether to give bracketed element 2 on specific intent.

The committee included "persuade" and "arrange" as options in element one because the statutory language, "procure," may be difficult for jurors to understand.

Give bracketed element 3 if it is alleged that the person procured, or otherwise caused to act, by the defendant was a minor "over" or "under" the age of 16 years. (Pen. Code, § 266i(b).)

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] [definition of "duress"].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude

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modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

AUTHORITY

- Elements. Pen. Code, § 266i.
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr. 195] [lewd act requires touching between prostitute and customer].
- Procurement Defined. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required. *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 70–78.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Pandering. Pen. Code, §§ 664, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819 [32 Cal.Rptr. 653]; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367 [175 P.2d 296], disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654–655, fn. 3 [56 Cal.Rptr. 110, 422 P.2d 998].

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].)

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RELATED ISSUES

See Related Issues section to CALCRIM No. 1150, *Pimping*.

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1152. Child Procurement

The defendant is charged [in Count ____] with (providing/causing) a child to engage in a lewd or lascivious act.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—gave/transported a child>

[1. The defendant intentionally (gave/transported/provided/made available) a child to someone else so the person could engage in a lewd or lascivious act with that child;]

<Alternative 1B—offered to give/transport a child>

[1. The defendant offered to (give/transport/provide/make available) a child to someone else so the person could engage in a lewd or lascivious act with that child;]

<Alternative 1C—caused child to engage in>

[1. The defendant (caused/persuaded/induced) a child to engage in a lewd or lascivious act with someone else;]

[AND]

2. When the defendant acted, the child was under the age of 16 years(;/).

<Give element 3 when instructing on "offered">

[AND

3. When the defendant made the offer, (he/she) intended to (give/transport/provide/make available) a child to someone else so the person could engage in a lewd or lascivious act with that child.]

A *lewd or lascivious act* is any touching of a child with the intent to sexually arouse either the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body or someone else's body at the instigation of the other person who has the required intent.]

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, give the appropriate alternative A–C depending on the evidence in the case. When giving alternative 1B, "offered," give element 3 as well.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Related Instructions

See CALCRIM Nos. 1110–1112, 1223, relating to lewd and lascivious acts in violation of Penal Code section 288.

AUTHORITY

- Elements. Pen. Code, § 266j.
- Any Touching of Child With Intent to Arouse. *People v. Martinez* (1995) 11 Cal.4th 434, 443–445, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [in context of Pen. Code, § 288; disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Child Touching Own Body Parts at Defendant's Request. *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction in context of Pen. Code, § 288]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Lewd Defined. *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 39, 45–46.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Child Procurement. Pen. Code, §§ 664, 266j.

RELATED ISSUES

Corroboration Not Required

A minor victim is not an accomplice and the jury need not be instructed that the minor's testimony requires corroboration. (*People v. Mena* (1988) 206 Cal.App.3d 420, 425 [254 Cal.Rptr. 10].)

See CALCRIM Nos. 1110–1112, relating to lewd and lascivious acts in violation of Penal Code section 288.

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1153. Prostitution: Engaging in Act

The defendant is charged [in Count ____] with engaging in an act of prostitution.

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully engaged in sexual intercourse or a lewd act with someone else in exchange for money [or other compensation].

A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification of either person.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements. Pen. Code, § 647(b).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].

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- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[1] (Matthew Bender).

RELATED ISSUES

Payment Does Not Need to Be Made Directly to Person Doing Act

"[W]e know of no statutory or case law requiring that payment be made to the person actually providing sexual favors." (*People v. Bell* (1988) 201 Cal.App.3d 1396, 1400 [248 Cal.Rptr. 57].)

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1154. Prostitution: Soliciting Another

The defendant is charged [in Count ____] with soliciting another person to engage in an act of prostitution.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant requested [or _____ <*insert other synonyms for "solicit," as appropriate*>] that another person engage in an act of prostitution;**

[AND]

2. **The defendant intended to engage in an act of prostitution with the other person(;/.)**

<Give element 3 when instructing that person solicited must receive message; see Bench Notes.>

[AND

3. **The other person received the communication containing the request.]**

A person *engages in an act of prostitution* if he or she has sexual intercourse or does a lewd act with someone else in exchange for money [or other compensation]. A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never

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received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 3.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements. Pen. Code, § 647(b).
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Solicitation Requires Specific Intent. *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134]; *People v. Love* (1980) 111 Cal.App.3d Supp. 1, 13 [168 Cal.Rptr. 591]; *People v. Dell* (1991) 232 Cal.App.3d 248, 264 [283 Cal.Rptr. 361].
- Solicitation Defined. *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication. *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- Solicitation Applies to Either Prostitute or Customer. *Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 575 [126 Cal.Rptr. 773].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[1] (Matthew Bender).

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RELATED ISSUES

See the Related Issues section of CALCRIM No. 441, *Solicitation: Elements*.

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1155. Prostitution: Agreeing to Engage in Act

The defendant is charged [in Count ____] with agreeing to engage in an act of prostitution.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant agreed to engage in an act of prostitution with someone else;**
2. **The defendant intended to engage in an act of prostitution with that person;**

AND

3. **In addition to agreeing, the defendant did something to further the commission of an act of prostitution.**

A person *engages in an act of prostitution* if he or she has sexual intercourse or does a lewd act with someone else in exchange for money [or other compensation]. A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

[The conduct that furthers the commission of the act of prostitution may happen before, after, or at the same time as the agreement to engage in prostitution.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

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AUTHORITY

- Elements. Pen. Code, § 647(b).
- Prostitution Defined. Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195] [lewd act requires touching between prostitute and customer].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Specific Intent Required. Pen. Code, § 647(b).
- Act in Furtherance Required. Pen. Code, § 647(b).
- Act in Furtherance May Precede Agreement. *In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1407–1408 [83 Cal.Rptr.2d 397]; contra, *People v. Davis* (1988) 201 Cal.App.3d Supp. 1, 4–5 [247 Cal.Rptr. 359].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[1] (Matthew Bender).

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1156. Loitering: For Prostitution

The defendant is charged [in Count ____] with loitering with the intent to commit prostitution.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant delayed or lingered in a public place;**
2. **When the defendant did so, (he/she) did not have a lawful purpose for being there;**

AND

3. **When the defendant did so, (he/she) intended to commit prostitution.**

As used here, a *public place* is (a/an/the) (area open to the public[(,/;)]/[or] alley[(,/;)]/ [or] plaza [(,/;)]/ [or] park[(,/;)]/ [or] driveway[(,/;)]/ [or] parking lot[(,/;)]/ [or] automobile[(,/;)]/ [or] building open to the general public[, including one that serves food or drink or provides entertainment][(,/;)]/ [or] doorway or entrance to a building or dwelling[(,/;)]/ [or] grounds enclosing a building or dwelling).

A person *intends to commit prostitution* if he or she intends to engage in sexual conduct with someone else in exchange for money [or other compensation]. *Sexual conduct* means sexual intercourse or touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. [*Prostitution* does not include sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public.]

The intent to commit prostitution may be shown by a person acting in a manner and under circumstances that openly demonstrate the intent to induce, entice, or solicit prostitution or to procure someone else to commit prostitution. In deciding whether the defendant acted with intent to commit prostitution, you may consider whether (he/she):

- **[Repeatedly beckoned to, stopped, engaged in conversations with, or attempted to stop or engage in**

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conversations with passersby in a way that indicated the solicitation of prostitution (./;)]

- **[Repeatedly stopped or attempted to stop vehicles by hailing, waving, or gesturing, or engaged or attempted to engage drivers or passengers in conversation, in a way that indicated the solicitation of prostitution(./;)]**
- **[Circled an area in a vehicle and repeatedly beckoned to, contacted, or attempted to contact or stop pedestrians or other motorists in a way that indicated the solicitation of prostitution(./;)]**
- **[Has engaged in any behavior indicative of prostitution activity within the six months before (his/her) arrest in this case(./;)]**
- **[Has been convicted of this crime or of any other crime relating to or involving prostitution within five years of (his/her) arrest in this case.]**

You should also consider whether any of these activities occurred in an area known for prostitution.

This list of factors is not intended to be a complete list of all the factors you may consider on the question of intent. The factors are provided only as examples to assist you in deciding whether the defendant acted with the intent to commit prostitution. Consider all the evidence presented in this case for whatever bearing you conclude it has on the question of the defendant's intent. Give the evidence whatever weight you decide that it deserves.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 653.22(a).

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- Factors to Consider to Prove Intent. Pen. Code, § 653.22(a), (b) & (c).
- Prostitution Defined. Pen. Code, § 653.20(a); see also Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195]; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. Pen. Code, § 653.20(b).
- Loiter Defined. Pen. Code, § 653.20(b).
- Statute Constitutional. *People v. Pulliam* (1998) 62 Cal.App.4th 1430, 1434–1439 [73 Cal.Rptr.2d 371].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 54.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.11[1], 144.20 (Matthew Bender).

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1157–1159. Reserved for Future Use

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(iii) Conduct in Public

1160. Indecent Exposure

The defendant is charged [in Count ____] with indecent exposure.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully exposed (his/her) genitals in the presence of another person or persons who might be offended or annoyed by the defendant's actions;**

[AND]

2. **When the defendant exposed (himself/herself), (he/she) acted lewdly by intending to direct public attention to (his/her) genitals for the purpose of sexually arousing or gratifying (himself/herself) or another person, or sexually offending another person(;/.)**

<Give element 3 if defendant charged with entering inhabited dwelling>

[AND]

[3. The willful and lewd exposure occurred after the defendant had entered an inhabited (dwelling house/part of a building/trailer coach) without consent.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[It is not required that another person actually see the exposed genitals.]

[A (house/part of a building/trailer coach) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged indecent exposure.]

[A (house/part of a building/trailer coach) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

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[A (house/part of a building/trailer coach) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *house* includes any (structure/garage/office/_____ <*insert other description*>) that is attached to the house and functionally connected with it.]

[A *trailer coach* is a vehicle without its own mode of power, designed to be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

[A *trailer coach* is [also] a park trailer that is intended for human habitation for recreational or seasonal use only and

1. **has a floor area of no more than 400 square feet;**
2. **is not more than 14 feet wide;**
3. **is built on a single chassis;**

AND

4. **may only be transported on public highways with a permit.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give element 3 if the defendant is charged with entering an inhabited dwelling.

If the defendant is charged with a prior conviction for indecent exposure give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (See *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr.2d 21]; *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)

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Give the bracketed sentence that begins, "It is not required that another person actually see" on request if the evidence shows that no one actually saw the defendant's genitals. (*People v. Carbajal* (2003) 114 Cal.App.4th 978, 986 [8 Cal.Rptr.3d 206].)

AUTHORITY

- Elements. Pen. Code, § 314.
- Affront Must Be Sexual. *In re Dallas W.* (2000) 85 Cal.App.4th 937, 939 [102 Cal.Rptr.2d 493]; *People v. Archer* (2002) 98 Cal.App.4th 402, 406 [119 Cal.Rptr.2d 783] ["sexual affront" means to sexually insult or offend another person].
- Exposing Person Must Have Intent to Expose Genitals. *People v. Massicot* (2002) 97 Cal.App.4th 920, 926–928 [118 Cal.Rptr.2d 705].
- Must Expose to Other Person But Other Person Need Not View. *People v. Carbajal* (2003) 114 Cal.App.4th 978, 986 [8 Cal.Rptr.3d 206].
- Lewd Intent Defined. *In re Smith* (1972) 7 Cal.3d 362, 365–366 [102 Cal.Rptr. 335, 497 P.2d 807].
- Lewd Intent Does Not Require That Genitals Be Touched. *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1766 [24 Cal.Rptr.2d 321]; see *People v. Meeker* (1989) 208 Cal.App.3d 358, 362 [256 Cal.Rptr. 109].
- "Private Parts" Means Genitals. *People v. Massicot* (2002) 97 Cal.App.4th 920, 925, fn. 3 [118 Cal.Rptr.2d 705]; see *In re Smith* (1972) 7 Cal.3d 362, 366 [102 Cal.Rptr. 335, 497 P.2d 807].
- Inhabitation Defined. See Pen. Code, § 459 [in context of burglary].
- Trailer Coach Defined. Veh. Code, § 635; Health & Saf. Code, § 18009.3.
- House Not Inhabited is Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 109–112.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[1] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempted Indecent Exposure. Pen. Code, §§ 664, 314; *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1766–1767 [24 Cal.Rptr.2d 321]; see also *People v. Finley* (1994) 26 Cal.App.4th 454, 456–459 [31 Cal.Rptr.2d 288] [attempted misdemeanor indecent exposure is not elevated to felony by recidivist provision of Pen. Code, § 314].

Indecent exposure is a misdemeanor if the defendant does not have qualifying priors and the alleged event did not occur in an inhabited dwelling. (Pen. Code, § 314.) If the defendant is charged with one of the factors that elevates the offense to a felony, then the misdemeanor is a lesser included offense.

Soliciting anyone to engage in lewd or dissolute conduct in any public place (see Pen. Code, § 647(a)) is not a lesser included offense of indecent exposure under Penal Code section 314, subdivision 1. (*People v. Meeker* (1989) 208 Cal.App.3d 358, 361–362 [256 Cal.Rptr. 79] [following construction of "lewd or dissolute conduct" in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636]]; contra, *People v. Curry* (1977) 76 Cal.App.3d 181, 186–187 [142 Cal.Rptr. 649]; *People v. Swearington* (1977) 71 Cal.App.3d 935, 944 [140 Cal.Rptr. 5].) Burglary is also not a necessarily included offense of unlawful entry for indecent exposure. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1768–1769 [24 Cal.Rptr.2d 321].)

RELATED ISSUES

Presence of Others

"[A] conviction for indecent exposure under Penal Code section 314, subdivision 1 requires evidence that a defendant actually exposed his or her genitals in the presence of another person, but there is no concomitant requirement that such person must actually have seen the defendant's genitals." (*People v. Carbajal* (2003) 114 Cal.App.4th 978, 986 [8 Cal.Rptr.3d 206].)

Burglary

Felony indecent exposure can be the underlying felony to support a burglary charge. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1767 [24 Cal.Rptr.2d 321].)

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After Entering

The statute does not require that the defendant expose himself or herself while still in the home. (See *People v. Mendoza* (2004) 118 Cal.App.4th 571, 575–576 [13 Cal.Rptr.3d 195] [discussing identical language in Pen. Code, § 647.6(a)].) It is sufficient if the defendant engaged in the conduct after entering the home and there is "a clear nexus between the residential entry and the . . . conduct." (*Id.* at p. 576.)

See the Related Issues section to CALCRIM No. 1701, *Burglary: Degrees*, for additional authority on "inhabited dwelling house."

(New January 2006)

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1161. Lewd Conduct in Public

The defendant is charged [in Count ____] with engaging in lewd conduct in public.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully engaged in the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;**
2. **The defendant did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**
3. **At the time the defendant engaged in the conduct, (he/she) was in (a public place/ [or] a place open to the public [or to public view]);**
4. **At the time the defendant engaged in the conduct, someone else who might have been offended was present;**

AND

5. **The defendant knew or reasonably should have known that another person who might have been offended by (his/her) conduct was present.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4 [181 Cal.Rptr. 723].
- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Lewd" and "Dissolute" Synonymous. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 46–47.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.20 (Matthew Bender).

RELATED ISSUES

Need Not Prove Someone Was Offended

"It is not the burden of the prosecution to prove that the observer was in fact offended by the conduct but only that the conduct was such that defendant should know that the observer 'may be offended.' " (*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 11 [181 Cal.Rptr. 723].)

Does Not Apply to Live Theater Performance

"It seems evident from the foregoing that the vagrancy law, [Penal Code] section 647, subdivision (a), was not intended to apply to live performances in a theater before an audience." (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 827–828 [83 Cal.Rptr. 819, 464 P.2d 483].)

(New January 2006)

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1162. Soliciting Lewd Conduct in Public

The defendant is charged [in Count ____] with soliciting another person to engage in lewd conduct in public.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant requested [or _____ <*insert other synonyms for "solicit," as appropriate*>] that another person engage in the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;**
2. **The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or in public view]);**
3. **When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);**
4. **The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);**
5. **When the defendant made the request, (he/she) did so with the intent to sexually arouse or gratify (himself/ herself) or another person, or to annoy or offend another person;**

[AND]

6. **The defendant knew or reasonably should have known that someone might be present who could be offended by the requested conduct(;/.)**

<Give element 7 when instructing that person solicited must receive message; see Bench Notes.>

[AND

7. **The other person received the communication containing the request.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

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[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 7.

AUTHORITY

- Elements. Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8–9 [181 Cal.Rptr. 723].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Solicitation Requires Specific Intent. *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- Solicitation Defined. *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication. *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- "Lewd" and "Dissolute" Synonymous. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64

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Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 46–47.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

(Revised August 2006)

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(iv) Failure to Register

1170. Failure to Register as Sex Offender

The defendant is charged [in Count ____] with failing to register as a sex offender.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was previously (convicted of/found to have committed) _____ <*specify the offense for which the defendant is allegedly required to register*>**
2. **The defendant resided (in _____ <*insert name of city*>, California/in an unincorporated area or a city with no police department in _____ <*insert name of county*> County, California/on the campus or in the facilities of _____ <*insert name of university or college*>);**
3. **The defendant actually knew (he/she) had a duty to register as a sex offender under Penal Code section 290 [within five working days of (his/her) birthday] wherever (he/she) resided;**

AND

<Alternative 4A—change of residence>

[4. The defendant willfully failed to register as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus or its facilities) within five working days of (coming into/ [or] changing (his/her) residence within) that (city/county/campus).]

<Alternative 4B—birthday>

[4. The defendant willfully failed to annually update (his/her) registration as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus) within five working days of (his/her) birthday.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This instruction is based on the language of the statute effective January 1, 2006. The instruction may not be appropriate for offenses that occurred prior to that date. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(a)(1)(A).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290(a)(1)(D).) If alternative 4B is given, also give the bracketed phrase in element 3.

If the defendant is charged with a prior conviction for failing to register, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (See *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr. 2d 21]; *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)

For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) The court should consider whether it is more appropriate to give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, or to give a modified version of CALCRIM No. 250, *Union Of Act And Intent: General Intent*, as explained in the Related Issues section to CALCRIM No. 250.

AUTHORITY

- Elements. Pen. Code, § 290(a)(1)(A) [change in residence] & (a)(1)(D) [birthday]; *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].

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- Willfully Defined. Pen. Code, § 7(1); see *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507].
- Actual Knowledge of Duty Required. *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Continuing Offense. *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528 [63 Cal.Rptr.2d 322, 936 P.2d 101].
- General Intent Crime. *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Johnson* (1998) 67 Cal.App.4th 67, 72 [78 Cal.Rptr.2d 795].
- No Duty to Define Residence. *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219 [64 Cal.Rptr.2d 545].
- Registration is Not Punishment. *In re Alva* (2004) 33 Cal.4th 254, 262 [14 Cal.Rptr.3d 811, 92 P.3d 311].
- Jury May Consider Evidence That Significant Involuntary Condition Deprived Defendant of Actual Knowledge. *People v. Sorden* (2005) 36 Cal.4th 65, 72 [29 Cal.Rptr.3d 777, 113 P.3d 565].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 184–188.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.04[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.20[1][a], Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

RELATED ISSUES

Other Violations of Section 290

This instruction applies to violations under Penal Code section 290(a)(1)(A) and (a)(1)(D). Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, § 290(f)(1)(A–C) & (3); *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [11 Cal.Rptr.3d 290, 86 P.3d 348] [under former Pen. Code, § 290(f), which allowed notice of change of

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address in writing, there is sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [10 Cal.Rptr.3d 712] [discussing meaning of "changed" residence]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [125 Cal.Rptr.2d 519] [must instruct on requirement of actual knowledge of duty to notify law enforcement when moving out of jurisdiction]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [84 Cal.Rptr.2d 241, 975 P.2d 30] [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)

2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290(a)(1)(B); *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [127 Cal.Rptr.2d 662] [court failed to instruct that jury must find that defendant actually knew of duty to register multiple residences]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [114 Cal.Rptr.2d 331].)
3. Update his or her registration at least once every 30 days if he or she is "a transient." (See Pen. Code, § 290(a)(1)(C).)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290(a)(1)(E).) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290(a)(1)(G).)
2. Sex offenders enrolled at, employed by, or carrying on a vocation at any university, college, community college, or other institution of higher learning. (See Pen. Code, § 290.01.)

In addition, providing false information on the registration form is a violation of section 290(g)(2). (See also *People v. Chan* (2005) 128 Cal.App.4th 408 [26 Cal.Rptr.3d 878].)

Forgetting to Register

If a person actually knows of his or her duty to register, "just forgetting" is not a defense. (*People v. Barker* (2004) 34 Cal.4th 345, 356–357 [18 Cal.Rptr.3d 260, 96 P.3d 507].) In reaching this conclusion, the court stated, "[w]e do not here express an opinion as to whether forgetfulness resulting from, for example, an *acute psychological condition*, or a *chronic*

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deficit of memory or intelligence, might negate the willfulness required for a section 290 violation." (*Id.* at p. 358 [italics in original].)

Registration Requirement for Consensual Oral Copulation With Minor

Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, § 290(a)(2)(A).) The mandatory registration requirement for consensual oral copulation with a minor is unenforceable because this disparity denies equal protection of the laws. (*People v. Hofsheier* 37 Cal.4th 1185, 1191, 1205–1206.) A defendant convicted of consensual oral copulation with a minor might, however, be required to register pursuant to judicial discretion under section 290(a)(2)(E). (*Id.* at p. 1208.)

Moving Between Counties-Failure to Notify County Leaving and County Moving To Can Only Be Punished as One Offense

A person who changes residences a single time, failing to notify both the jurisdiction he or she is departing from and the jurisdiction he or she is entering, commits two violations of Penal Code section 290 but can only be punished for one. (*People v. Britt* (2004) 32 Cal.4th 944, 953–954 [12 Cal.Rptr.2d 66, 87 P.3d 812].) Further, if the defendant has been prosecuted in one county for the violation, and the prosecutor in the second county is aware of the previous prosecution, the second county cannot subsequently prosecute the defendant. (*Id.* at pp. 955–956.)

Notice of Duty to Register on Release From Confinement

No reported case has held that the technical notice requirements are elements of the offense, especially when the jury is told that they must find the defendant had actual knowledge. (See Pen. Code, § 290(b); *People v. Garcia* (2001) 25 Cal.4th 744, 754, 755–756 [10 Cal.Rptr.2d 355, 23 P.3d 590] [if defendant willfully and knowingly failed to register, *Buford* does not require reversal merely because authorities failed to comply with technical requirements]; see also *People v. Buford* (1974) 42 Cal.App.3d 975, 987 [117 Cal.Rptr. 333] [revoking probation for noncompliance with section 290, an abuse of discretion when court and jail officials also failed to comply].) The court in *Garcia* did state, however, that the "court's instructions on 'willfulness' should have required proof that, in addition to being formally notified by the appropriate officers as required by section

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290, in order to willfully violate section 290 the defendant must actually know of his duty to register." (*People v. Garcia, supra,* 25 Cal.4th at p. 754.)

(Revised August 2006)

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(v) Other Offenses

1180. Incest With a Minor

The defendant is charged [in Count ____] with incest.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant had sexual intercourse with a minor;**

AND

2. **The defendant and the minor are related to each other as (parent and child/[great-]grandparent and [great-]grandchild/[half] brother and [half] sister/uncle and niece/aunt and nephew).**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

A *minor* is a person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

This instruction focuses on incestuous sexual intercourse with a minor, which is the most likely form of incest to be charged. Incest is also committed by intercourse between adult relatives within the specified degree of consanguinity, or by an incestuous marriage. (See Pen. Code, § 285.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

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AUTHORITY

- Elements. Pen. Code, § 285.
- Incestuous Marriages. Fam. Code, § 2200.
- Sexual Intercourse Defined. See Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585 [250 Cal.Rptr. 635, 758 P.2d 1165]].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 138–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Incest. Pen. Code, §§ 664, 285.

RELATED ISSUES

Accomplice Instructions

A minor is a victim of, not at accomplice to, incest. Accomplice instructions are not appropriate in a trial for incest involving a minor. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see *People v. Stoll* (1927) 84 Cal.App. 99, 101–102 [257 P. 583].) An exception may exist when two minors engage in consensual sexual intercourse, and thus both are victims of the other's crime. (*People v. Tobias, supra,* 327 Cal.4th at p. 334; see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364–1365 [73 Cal.Rptr.2d 331] [minor perpetrator under Pen. Code, § 261.5].) An adult woman who voluntarily engages in the incestuous act is an accomplice, whose testimony must be corroborated. (See *People v. Stratton* (1904) 141 Cal. 604, 609 [75 P. 166].)

Half-Blood Relationship

Family Code section 2200 prohibits sexual relations between brothers and sisters of half blood, but not between uncles and nieces of half blood. (*People v. Baker* (1968) 69 Cal.2d 44, 50 [69 Cal.Rptr. 595, 442 P.2d 675] [construing former version of § 2200].) However, sexual intercourse between persons the law deems to be related is proscribed. A trial court

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may properly instruct on the conclusive presumption of legitimacy (see Fam. Code, § 7540) if a defendant uncle asserts that the victim's mother is actually his half sister. The presumption requires the jury to find that if the defendant's mother and her potent husband were living together when the defendant was conceived, the husband was the defendant's father, and thus the defendant was a full brother of the victim's mother. (*People v. Russell* (1971) 22 Cal.App.3d 330, 335 [99 Cal.Rptr. 277].)

Lack of Knowledge as Defense

No reported cases have held that lack of knowledge of the prohibited relationship is a defense to incest. (But see *People v. Patterson* (1894) 102 Cal. 239, 242–243 [36 P. 436] [dictum that party without knowledge of relationship would not be guilty]; see also *People v. Vogel* (1956) 46 Cal.2d 798, 801, 805 [299 P.2d 850] [good faith belief is defense to bigamy].)

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1181. Sexual Abuse of Animal

The defendant is charged [in Count ____] with sexual abuse of an animal.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant sexually assaulted an animal;**
2. **The defendant did so with the intent of arousing or gratifying (his/her) own sexual desire;**

AND

3. **The animal was (abandoned or neglected/_____ <***insert other description of "animal protected by Pen. Code, § 597f"***>).**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 286.5 only applies to an "animal protected by Section 597f." Penal Code section 597f broadly establishes the authority of public officers to take possession of and care for abandoned and neglected animals. Thus, the committee has included element 3.

AUTHORITY

- Elements. Pen. Code, §§ 286.5; 597f.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 25.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.12[1] (Matthew Bender).

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D. EVIDENCE

1190. Other Evidence Not Required to Support Testimony in Sex Offense Case

Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.

BENCH NOTES

Instructional Duty

This instruction may be given on request if a complaining witness testifies in a sex offense case. The court has a **sua sponte** duty to give CALCRIM No. 301, *Single Witness's Testimony,* in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].) Because both instructions correctly state the law and each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

AUTHORITY

- Instructional Requirements. *People v. Blassingill* (1988) 199 Cal.App.3d 1413, 1422 [245 Cal.Rptr. 599]; *People v. Akey* (1912) 163 Cal. 54, 55–56 [124 P. 718].
- Conviction of Sex Crime Sustained on Prosecutrix's Uncorroborated Testimony. *People v. Poggi* (1988) 45 Cal.3d 306, 326 [246 Cal.Rptr. 886, 753 P.2d 1082].
- Given Together With Instruction on Single Witness's Testimony. *People v. Gammage* (1992) 2 Cal.4th 693, 701–702 [7 Cal.Rptr.2d 541, 828 P.2d 682]; *People v. Hollis* (1991) 235 Cal.App.3d 1521, 1525–1526 [1 Cal.Rptr.2d 524].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 651.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii] (Matthew Bender).

(New January 2006)

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1191. Evidence of Uncharged Sex Offense

The People presented evidence that the defendant committed the crime[s] of _____ <*insert description of offense[s]*> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged sex offense[s]*>, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged sex offense[s]*>. The People must still prove each element of (the/every) charge beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>].]

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21

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Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence]; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.1112(e) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

Evidence Code section 1108(a) provides that "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101." Subdivision (d)(1) defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following[,]" listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

In the fourth paragraph, the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with "Do not consider" on request.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 852, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 853, *Evidence of Uncharged Abuse to Elder or Dependent Person.*

AUTHORITY

- Instructional Requirement. Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].

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- Sexual Offense Defined. Evid. Code, § 1108(d)(1).
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 624]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [same].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 96–97.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

COMMENTARY

The fourth paragraph of this instruction tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433] [in context of prior acts of domestic violence].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the fourth paragraph may be replaced with the following:

> If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged sex offense*>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of _____ <*insert charged sex offense*>. The People must still prove each element of _____ <*insert charged sex offense*> beyond a reasonable doubt.

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RELATED ISSUES

Constitutional Challenges

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Expert Testimony

Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

Rebuttal Evidence

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

Subsequent Offenses Admissible

"[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108." (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

Evidence of Acquittal

If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

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1192. Testimony on Rape Trauma Syndrome

You have heard testimony from _____ <*insert name of expert*> regarding rape trauma syndrome.

_____'s <*insert name of expert*> testimony about rape trauma syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).

You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged rape victim*> conduct was not inconsistent with the conduct of someone who has been raped, and in evaluating the believability of her testimony.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on rape trauma syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [**sua sponte** duty in context of child sexual abuse accommodation syndrome (CSAAS)]; *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 10th ed. 2001) Sua Sponte Instructions, § 2.132; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] [instruction on CSAAS only required on request].)

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness Testimony*.

AUTHORITY

- Rebut Inference That Victim's Conduct Inconsistent With Claim of Rape. *People v. Bledsoe* (1984) 36 Cal.3d 236, 247–248 [203 Cal.Rptr. 450, 681 P.2d 291].
- Syndrome Evidence Not Admissible to Prove Rape Occurred. *People v. Bledsoe* (1984) 36 Cal.3d 236, 251 [203 Cal.Rptr. 450, 681 P.2d 291].

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Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 52.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

COMMENTARY

It is unnecessary and potentially misleading to instruct that the expert testimony assumes that a rape has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child molestation].)

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1193. Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ <*insert name of expert*> regarding child sexual abuse accommodation syndrome.

_____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).

You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged victim of abuse*> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on child sexual abuse accommodation syndrome. (*People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rtpr.2d 431]; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].)

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness*.

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility. *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 53–55.

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children's common reactions to the experience. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [249 Cal.Rptr. 886].) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660].)

The prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735 [256 Cal.Rptr. 446]; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450 [271 Cal.Rptr. 653]), or the victim's credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745 [32 Cal.Rptr.2d 345]).

RELATED ISSUES

Expert Testimony Regarding Parent's Behavior

An expert may also testify regarding reasons why a parent may delay reporting molestation of his or her child. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301 [283 Cal.Rptr. 382, 812 P.2d 563].)

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1194. Consent: Prior Sexual Intercourse

You have heard evidence that (_____ <*insert name of complaining witness*>/Jane Doe/John Doe) had consensual sexual intercourse with the defendant before the act that is charged in this case. You may consider this evidence only to help you decide (whether the alleged victim consented to the charged act[s]/ [and] whether the defendant reasonably and in good faith believed that (_____ <*insert name of complaining witness*>/Jane Doe/John Doe) consented to the charged act[s]). Do not consider this evidence for any other purpose.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give a limiting admonition if the defendant is charged with rape or unlawful sexual intercourse or an attempt or assault with intent to commit either crime and evidence of prior sexual intercourse with the alleged victim has been admitted. (Pen. Code, § 1127d.)

If during the trial the court referred to a complaining witness by the name of Jane or John Doe, use that designation in giving this instruction. (See Pen. Code, §§ 293, 293.5.)

AUTHORITY

- Instructional Requirements. Pen. Code, § 1127d.
- Protecting Identity of Complaining Witness. Pen. Code §§ 293, 293.5.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 65.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[1][f], [3][a] (Matthew Bender).

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RELATED ISSUES

Admissibility of Sexual Conduct of Complaining Witness

Evidence Code section 782 sets out the procedure for admitting evidence of the sexual conduct of the complaining witness.

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KIDNAPPING

A. KIDNAPPING

(i) Aggravated

1200. Kidnapping: For Child Molestation
1201. Kidnapping: Child or Person Incapable of Consent
1202. Kidnapping: For Ransom, Reward, or Extortion
1203. Kidnapping: For Robbery, Rape, or Other Sex Offenses
1204. Kidnapping: During Carjacking
1205–1214. Reserved for Future Use

(ii) Simple Kidnapping

1215. Kidnapping
1216–1224. Reserved for Future Use

B. DEFENSES

1225. Defense to Kidnapping: Protecting Child From Imminent Harm
1226. Defense to Kidnapping: Citizen's Arrest
1227–1239. Reserved for Future Use

C. FALSE IMPRISONMENT

1240. Felony False Imprisonment
1241. False Imprisonment: Hostage
1242. Misdemeanor False Imprisonment
1243–1249. Reserved for Future Use

D. CHILD ABDUCTION

1250. Child Abduction: No Right to Custody
1251. Child Abduction: By Depriving Right to Custody or Visitation
1252. Defense to Child Abduction: Protection From Immediate Injury
1253–1299. Reserved for Future Use

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A. KIDNAPPING

(i) Aggravated

1200. Kidnapping: For Child Molestation

The defendant is charged [in Count ____] with kidnapping for the purpose of child molestation.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (persuaded/hired/enticed/decoyed/ [or] seduced by false promises or misrepresentations) a child younger than 14 years old to go somewhere;**
2. **When the defendant did so, (he/she) intended to commit a lewd or lascivious act on the child;**

AND

3. **As a result of the defendant's conduct, the child then moved or was moved a substantial distance.**

[As used here, *substantial distance* means more than a slight or trivial distance. The movement must have substantially increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the molestation. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]

As used here, a *lewd or lascivious act* is any touching of a child with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of either the perpetrator or the child. The touching does not need to be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body, the perpetrator's body, or someone else's body at the instigation of a perpetrator who has the required intent.]

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give this instruction when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act. Give CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent,* when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement.

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Related Instructions

Kidnapping with intent to commit a rape or other specified sex crimes is a separate offense under Penal Code section 209(b). (*People v. Rayford* (1994) 9 Cal.4th 1, 8–11 [36 Cal.Rptr.2d 317, 884 P.2d 1369].) See CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions based on violations of Penal Code section 288, see CALCRIM No. 1110, *Lewd or Lascivious Acts: Child Under 14*, and the following instructions in that series.

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AUTHORITY

- Elements. Pen. Code, §§ 207(b), 288(a).
- Increased Prison Term If Victim Under 14 Years of Age. Pen. Code, § 208(b).
- Asportation Requirement. See *People v. Rayford* (1994) 9 Cal.4th 1, 11–14, 20 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d. 225].
- Lewd or Lascivious Acts Defined. *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; *People v. Levesque* (1995) 35 Cal.App.4th 530, 538–542 [41 Cal.Rptr.2d 439]; *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1321–1326 [33 Cal.Rptr.2d 821].
- Substantial Distance Requirement. See *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 246, 247, 255.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[1][a], [3] (Matthew Bender).

COMMENTARY

This instruction states that the movement must "substantially" increase the risk of harm beyond that necessarily present in the molestation. For further discussion, see the Commentary section to CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

LESSER INCLUDED OFFENSES

- Kidnapping. Pen. Code, § 207.
- Attempted Kidnapping. Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].

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False imprisonment is a lesser included offense if there is an unlawful restraint of the child. (See Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338].)

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1201. Kidnapping: Child or Person Incapable of Consent

The defendant is charged [in Count ____] with kidnapping (a child/ [or] a person with a mental impairment who was not capable of giving legal consent to the movement).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used enough physical force to take and carry away an unresisting (child/ [or] person with a mental impairment);**
2. **The defendant moved the (child/ [or] person with a mental impairment) a substantial distance;**

[AND]

3. **The defendant moved the (child/ [or] mentally impaired person) with an illegal intent or for an illegal purpose(;/.)**

[AND]

<Alternative 4A—alleged victim under 14 years.>

[4. The child was under 14 years old at the time of the movement(;/.)]

<Alternative 4B—alleged victim has mental impairment.>

[4. _____ <*Insert name of complaining witness*> suffered from a mental impairment that made (him/her) incapable of giving legal consent to the movement.]

Substantial distance **means more than a slight or trivial distance. In deciding whether the distance was substantial, consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]**

A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences.

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[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give alternative 4A if the defendant is charged with kidnapping a person under 14 years of age. (Pen. Code, § 208(b).) Do not use this bracketed language if a biological parent, a natural father, an adoptive parent, or someone with access to the child by a court order takes the child. (*Ibid.*) Give alternative 4B if the alleged victim has a mental impairment.

In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

Give this instruction when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement. (See, e.g., *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; see also 2003 Amendments to Penal Code, § 207(e) [codifying holding of *In re Michele D.*].) Give CALCRIM No. 1200, *Kidnapping: For Child Molestation*, when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act.

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Related Instructions

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents,

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while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*.

AUTHORITY

- Elements. Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr. 206] [ignorance of victim's age not a defense].
- Asportation Requirement. See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].
- Substantial Distance Requirement. *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 252, 253.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person* § 142.14[1], [2][a] (Matthew Bender).

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COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take and carry away" as the more inclusive terms, but the statutory terms "steal," "hold," "detain" and "arrest" may be used if any of these more closely matches the evidence.

LESSER INCLUDED OFFENSES

- Attempted Kidnapping. Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

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1202. Kidnapping: For Ransom, Reward, or Extortion

The defendant is charged [in Count ____] with kidnapping for the purpose of (ransom[,]/ [or] reward[,]/ [or] extortion) [that resulted in (death[,]/ [or] bodily harm[,]/ [or] exposure to a substantial likelihood of death)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed) someone;**

<Alternative 2A—held or detained>

[2. The defendant held or detained that person;]

<Alternative 2B—intended to hold or detain that person>

[2. When the defendant acted, (he/she) intended to hold or detain the person;]

AND

3. **The defendant did so (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get money or something valuable).**

[It is not necessary that the person be moved for any distance.]

[Someone intends to commit *extortion* if he or she intends to: (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone intends to commit *extortion* if he or she: (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act.] [An *official act* is an act that a person does in his or her official capacity using the authority of his or her public office.]

<Sentencing Factor>

[If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), you must then decide whether the

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People have proved the additional allegation that the defendant (caused the kidnapped person to (die/suffer bodily harm)/ [or] intentionally confined the kidnapped person in a way that created a substantial risk of death).

[*Bodily harm* means any substantial physical injury resulting from the use of force that is more than the force necessary to commit kidnapping.]

[The defendant caused _____'s <*insert name of allegedly kidnapped person*> **(death/bodily harm) if:**

1. **A reasonable person in the defendant's position would have foreseen that the defendant's use of force or fear could begin a chain of events likely to result in _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**
2. **The defendant's use of force or fear was a direct and substantial factor in causing _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**

AND

3. **_____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm) would not have happened if the defendant had not used force or fear to hold or detain _____** <*insert name of allegedly kidnapped person*>**.**

A *substantial factor* is more than a trivial or remote factor. However, it need not have been the only factor that caused _____'s <*insert name of allegedly kidnapped person*> **(death/bodily harm).]**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), the court has a **sua sponte** duty to instruct on the sentencing factor. (See *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762] [bodily harm defined]); see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318 [76 Cal.Rptr.2d 160] [court must instruct on general principles of law relevant to issues raised by the evidence].) The court must also give the jury a verdict form on which the jury can indicate whether this allegation has been proved. If causation is an issue, the court has a **sua sponte** duty to give the bracketed section that begins "The defendant caused." (See Pen. Code, § 209(a); *People v. Monk* (1961) 56 Cal.2d 288, 296 [14 Cal.Rptr. 633, 363 P.2d 865]; *People v. Reed* (1969) 270 Cal.App.2d 37, 48–49 [75 Cal.Rptr. 430].)

Give alternative 2A if the evidence supports the conclusion that the defendant actually held or detained the alleged victim. Otherwise, give alternative 2B. (See Pen. Code, § 209(a).)

"Extortion" is defined in Penal Code section 518. If the kidnapping was for purposes of extortion, give one of the bracketed definitions of extortion on request. Give the second definition if the defendant is charged with intending to extort an official act. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition].) It appears that this type of extortion rarely occurs in the context of kidnapping, so it is excluded from this instruction.

Related Instructions

For the elements of extortion, see CALCRIM No. 1830, *Extortion by Threat or Force*.

AUTHORITY

- Elements. Pen. Code, § 209(a).
- Extortion. Pen. Code, § 518; *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 762].

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- Amount of Physical Force Required. *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- Bodily Injury Defined. *People v. Chacon* (1995) 37 Cal.App.4th 52, 59; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686; see *People v. Reed* (1969) 270 Cal.App.2d 37, 48–50 [75 Cal.Rptr. 430] [injury reasonably foreseeable from defendant's act].
- Control Over Victim When Intent Formed. *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required. *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227 [277 Cal.Rptr. 382].
- Official Act Defined. *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 266–273.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

COMMENTARY

A trial court may refuse to define "reward." There is no need to instruct a jury on the meaning of terms in common usage. Reward means something given in return for good or evil done or received, and especially something that is offered or given for some service or attainment. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 367–368 [68 Cal.Rptr.2d 61].) In the absence of a request, there is also no duty to define "ransom." The word has no statutory definition and is commonly understood by those familiar with the English language. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628].)

LESSER INCLUDED OFFENSES

- False Imprisonment. Pen. Code, §§ 236, 237; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [43 Cal.Rptr.2d 434]; *People v. Magana*

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(1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

- Extortion. Pen. Code, § 518.
- Attempted Extortion. Pen. Code, §§ 664, 518.

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), then kidnapping for ransom without death or bodily harm is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the allegation has been proved.

Simple kidnapping under section 207 of the Penal Code is not a lesser and necessarily included offense of kidnapping for ransom, reward, or extortion. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368, fn. 56 [68 Cal.Rptr.2d. 61] [kidnapping for ransom can be accomplished without asportation while simple kidnapping cannot]; see *People v. Macinnes* (1973) 30 Cal.App.3d 838, 843–844 [106 Cal.Rptr. 589]; *People v. Bigelow* (1984) 37 Cal.3d 731, 755, fn. 14 [209 Cal.Rptr. 328, 691 P.2d 994].)

RELATED ISSUES

Extortion Target

The kidnapped victim may also be the person from whom the defendant wishes to extort something. (*People v. Ibrahim* (1993) 19 Cal.App.4th 1692, 1696–1698 [24 Cal.Rptr.2d 269.)

No Good-Faith Exception

A good faith exception to extortion or kidnapping for ransom does not exist. Even actual debts cannot be collected by the reprehensible and dangerous means of abducting and holding a person to be ransomed by payment of the debt. (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305].)

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1203. Kidnapping: For Robbery, Rape, or Other Sex Offenses

The defendant is charged [in Count ____] with kidnapping for the purpose of (robbery/rape/spousal rape/oral copulation/ sodomy/sexual penetration).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration);**
2. **Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear;**
3. **Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;**
4. **The other person was moved or made to move a distance beyond that merely incidental to the commission of a (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration);**

[AND]

5. **The other person did not consent to the movement(;/.)**

<Give element 6 if instructing on reasonable belief in consent>

[AND

6. **The defendant did not actually and reasonably believe that the other person consented to the movement.]**

[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[As used here, *substantial distance* means more than a slight or trivial distance. The movement must have substantially increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration).

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In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]

[To be guilty of kidnapping for the purpose of (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration), the defendant does not actually have to commit the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration).]

To decide whether the defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration), please refer to the separate instructions that I (will give/have given) you on that crime.

<Defense: Good Faith Belief in Consent>

[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>

[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See People v. Camden (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant's reasonable and actual belief in the victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

Related Instructions

Kidnapping a child for the purpose of committing a lewd or lascivious act is a separate crime under Penal Code section 207(b). See CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

AUTHORITY

- Elements. Pen. Code, § 209(b); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, 22 [36 Cal.Rptr.2d 317, 884 P.2d 1369] [following modified two-prong *Daniels* test for movement necessary for aggravated kidnapping]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80

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Cal.Rptr. 897, 459 P.2d 225]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [112 Cal.Rptr.2d 826].

- Robbery Defined. Pen. Code, § 211.
- Rape Defined. Pen. Code, § 261.
- Other Sex Offenses Defined. Pen. Code, §§ 262 [spousal rape], 286 [sodomy], 288a [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking. *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery. *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim. *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear. See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 257–265, 274, 275.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

COMMENTARY

The instruction states that the movement must "substantially" increase the risk of harm to the victim beyond that necessarily included in the underlying robbery, rape, or sex offense. In *People v. Martinez* (1999) 20 Cal.4th 225 [83 Cal.Rptr.2d 533, 973 P.2d 512], the Court observed that

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"[u]nlike our decisional authority, [section 209(b)(2)] does not require that the movement 'substantially' increase the risk of harm to the victim." (*Id.* at p. 232, fn. 4 [dictum, discussing 1997 amendment to section 209(b)(2)].) One appellate court has followed the *Martinez* dictum in holding that kidnapping for carjacking does not require that the physical movement of the victim *substantially* increase the risk of harm. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415 [124 Cal.Rptr.2d 92].) Nevertheless, a recent Supreme Court case repeats the "substantial" increase in harm element without discussing the *Martinez* footnote. (See *People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493].) Until this issued is clarified, the committee decided to retain the word "substantial."

LESSER INCLUDED OFFENSES

- Kidnapping. Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189 [77 Cal.Rptr.2d 564].
- Attempted Kidnapping. Pen. Code, §§ 664, 207.
- False Imprisonment. Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171 [112 Cal.Rptr.2d 826].

RELATED ISSUES

Psychological Harm

Psychological harm may be sufficient to support conviction for aggravated kidnapping under Penal Code section 209(b). An increased risk of harm is not limited to a risk of bodily harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493] [substantial movement of robbery victim that posed substantial increase in risk of psychological trauma beyond that expected from stationary robbery].)

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1204. Kidnapping: During Carjacking

The defendant is charged [in Count ____] with kidnapping during a carjacking.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed a carjacking;**
2. **During the carjacking, the defendant took, held, or detained another person by using force or by instilling reasonable fear;**
3. **The defendant moved the other person or made that person move a substantial distance from the vicinity of the carjacking;**
4. **The defendant moved or caused the other person to move with the intent to facilitate the carjacking [or to help (himself/herself) escape/or to prevent the other person from sounding an alarm];**
5. **The person moved was not one of the carjackers;**

[AND]

6. **The other person did not consent to the movement(;/)**

<Give element 7 when instructing on reasonable belief in consent.>

[AND

7. **The defendant did not actually and reasonably believe that the other person consented to the movement.]**

[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

<Defense: Good Faith Belief in Consent>

[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement.

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If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>

[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]

To decide whether the defendant committed carjacking, please refer to the separate instructions that I (will give/have given) you on that crime.

[As used here, *substantial distance* means more than a slight or trivial distance. The movement must have been more than merely brief and incidental to the commission of the carjacking. The movement must also have substantially increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the carjacking. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.]

[*Fear*, as used in this instruction, means fear of injury to the person or injury to the person's family or property.] [It also means fear of immediate injury to another person present during the incident or to that person's property.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of carjacking. Give CALCRIM No. 1650, *Carjacking*.

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) An optional paragraph is provided for this purpose, "Defense: Consent Given."

The court has a **sua sponte** duty to instruct on the defendant's reasonable and actual belief in the victim's consent to go with the defendant, if supported by the evidence. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) Give bracketed element 7 and the paragraph "Defense: Good-Faith Belief in Consent."

AUTHORITY

- Elements. Pen. Code, §§ 207(a), 209.5(a), (b), 215(a).
- Force or Fear Requirement. *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820] [fear must be reasonable].
- Incidental Movement. See *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Increased Risk of Harm. *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415 [124 Cal.Rptr.2d 92].
- Intent to Facilitate Commission of Carjacking. *People v. Perez* (2000) 84 Cal.App.4th 856, 860–861 [101 Cal.Rptr.2d 376].

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- Substantial Distance Requirement. *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877].
- Vicinity of Carjacking. *People v. Moore* (1999) 75 Cal.App.4th 37, 43–46 [88 Cal.Rptr.2d 914].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10A, 142.14 (Matthew Bender).

COMMENTARY

See the Commentary to CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

LESSER INCLUDED OFFENSES

- Carjacking. Pen. Code, § 215(a); *People v. Jones* (1999) 75 Cal.App.4th 616, 624–626 [89 Cal.Rptr.2d 485]; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765 [64 Cal.Rptr.2d 233] [Pen. Code, § 209.5 requires completed offense of carjacking].
- Attempted Carjacking. Pen. Code, §§ 664, 215(a); *People v. Jones* (1999) 75 Cal.App.4th 616, 626 [89 Cal.Rptr.2d 485].
- False Imprisonment. Pen. Code, §§ 236, 237; see *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088–1089 [53 Cal.Rptr.2d 241]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

An unlawful taking or driving of a vehicle with an intent to temporarily deprive the owner of possession (Veh. Code, § 10851(a)) is not a necessarily included lesser offense or a lesser related offense of kidnapping during a carjacking. (*People v. Russell* (1996) 45 Cal.App.4th 1083, 1088–1091 [53 Cal.Rptr.2d 241] [evidence only supported finding of kidnapping by force or fear; automobile joyriding formerly governed by Pen. Code, § 499b].)

Grand theft is not a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 849, 968 P.2d 48].)

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RELATED ISSUES

Dominion and Control

Carjacking can occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [victim was not physically present when defendant drove car away].)

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(ii) Simple Kidnapping

1215. Kidnapping

The defendant is charged [in Count ____] with kidnapping.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took, held, or detained another person by using force or by instilling reasonable fear;**
2. **Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;**

[AND]

3. **The other person did not consent to the movement(;/.)**

<Give element 4 when instructing on reasonable belief in consent.>

[AND]

[4. The defendant did not actually and reasonably believe that the other person consented to the movement.]

[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[*Substantial distance* means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

[The defendant is also charged in Count ____ with _____ *<insert crime>*. In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a

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distance beyond that merely incidental to the commission of _____ <*insert crime*>.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief in Consent>

[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>

[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

The bracketed paragraph that begins with "The defendant is also charged" must be given on request when an associated crime is charged. (See *People v. Martinez, supra*, 20 Cal.4th at pp. 237–238.) See also Commentary to CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913] overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) An optional paragraph is provided for this purpose, "Defense: Consent Given."

On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The court has a **sua sponte** duty to instruct on the defendant's reasonable and actual belief in the victim's consent to go with the defendant, if supported by the evidence. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) Give bracketed element 4 and the bracketed paragraph on the defense.

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Related Instructions

If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen's Arrest.*

AUTHORITY

- Elements. Pen. Code, § 207(a).
- Punishment If Victim Under 14 Years of Age. Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not a defense].
- Asportation Requirement. *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement. See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement. *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent. Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].

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- Incidental Movement Test. *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Intent Requirement. *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement. *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 246–255, 277.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take," "hold," or "detain" as the more inclusive terms, but includes in brackets the statutory terms "steal" and "arrest" if either one more closely matches the evidence.

LESSER INCLUDED OFFENSES

- Attempted Kidnapping. Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].
- False Imprisonment. Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

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RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

Threat of Arrest

"[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim's belief is objectively reasonable." (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

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B. DEFENSES

1225. Defense to Kidnapping: Protecting Child From Imminent Harm

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The defendant is not guilty of kidnapping if (he/she) (took/stole/enticed away/detained/concealed/harbored) a child under the age of 14 years to protect that child from danger of imminent harm.

An *imminent harm* is an immediate and present threat of harm. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that the child was in imminent danger.

<Alternative A—reasonable doubt standard>

[The People have the burden of proving beyond a reasonable doubt that the defendant did not act to protect the child from the danger of imminent harm. If the People have not met this burden, you must find the defendant not guilty of kidnapping.]

<Alternative B—preponderance standard>

[The defendant has the burden of proving by a preponderance of the evidence that (he/she) was acting to protect the child from danger of imminent harm. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

BENCH NOTES

Instructional Duty

No reported cases specifically discuss the court's duty to instruct on the prevention of imminent harm to a child. Generally, an instruction on a defense must be given **sua sponte** if there is substantial evidence supporting the defense and the defendant is relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People*

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v. Sedeno (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1] and in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10, 164–178 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 3 [222 Cal.Rptr. 630].)

The prevention of imminent harm may be asserted against the following forms of kidnapping (Pen. Code, § 207(f)(1)):

1. Simple kidnapping by force or fear. (Pen. Code, § 207(a).)
2. Kidnapping for the purpose of committing a lewd or lascivious act with a child. (Pen. Code, § 207(b).)
3. Kidnapping by force or fear for the purpose of selling the victim into slavery or involuntary servitude. (Pen. Code, § 207(c).)
4. Kidnapping by bringing a person unlawfully abducted out of state into California. (Pen. Code, § 207(d).)

Whether the defendant must prove this defense by a preponderance of the evidence or the prosecution must prove its absence beyond a reasonable doubt has not been finally resolved. (See *In re Michele D.* (2002) 29 Cal.4th 600, 611 [128 Cal.Rptr.2d 92, 59 P.3d 164] [observing in dicta that this is a "limited affirmative defense"].) The court must instruct as to which party bears the burden. (*People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) The committee has provided the court with both options. The court must select and give one of the two options. The committee recommends reviewing *People v. Mower, supra,* 28 Cal.4th at pp. 478–479, discussing affirmative defenses and burdens of proof generally. (See also *In re Michele D., supra,* 29 Cal.4th at p. 611 [the prosecution bears the burden of proving that the defendant kidnapped the minor for an illegal purpose]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593] [same]; *People v. Ojeda-Parra* (1992) 7 Cal.App.4th 46, 50 [8 Cal.Rptr.2d 634] [same].)

Related Instructions

CALCRIM No. 3403, *Necessity*.

CALCRIM No. 3402, *Duress or Threats*.

AUTHORITY

- Instructional Requirements. Pen. Code, § 207(f)(1).

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- Imminent Harm Defined. See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269 [62 Cal.Rptr.2d 345] [defining "imminent" for purposes of imperfect self-defense to murder charge]; *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [81 Cal.Rptr.2d 535] [citing with approval definition of necessity that includes physical harm].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][a] (Matthew Bender).

RELATED ISSUES

Whether Belief Must Be Reasonable

The language of Penal Code section 207(f)(1) does explicitly require that the defendant "reasonably" believe that the child was in danger of harm. There are no reported cases on this issue.

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1226. Defense to Kidnapping: Citizen's Arrest

The defendant is not guilty of kidnapping if (he/she) was making a lawful citizen's arrest. The defendant was making a lawful citizen's arrest if (he/she) acted because:

<Alternative A—person actually committed felony.>

[The person arrested committed _____ *<insert specific felony>***(;/.)]**

[OR]

<Alternative B—reasonable cause to believe person committed felony.>

[_____ *<Insert specific felony>* **had been committed, and the defendant had reasonable cause to believe the person arrested committed it(;/.)]**

[OR]

<Alternative C—person committed misdemeanor in defendant's presence.>

[The person arrested committed or attempted to commit _____ *<insert specific misdemeanor or infraction>* **in the defendant's presence.]**

[Someone has *reasonable cause* if he or she knows facts that would persuade someone of reasonable caution that the person to be arrested has committed a crime.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not making a lawful citizen's arrest. If the People have not met this burden, you must find the defendant not guilty of kidnapping.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on making a citizen's arrest when there is sufficient evidence supporting each of the factors establishing the defense. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1151–1152 [74 Cal.Rptr.2d 121, 954 P.2d 384] [crime occurred before 1990 adoption of Pen. Code, § 207(e)(2); no obligation to instruct sua sponte if insubstantial evidence of defense].)

The three bracketed alternative paragraphs reflect the situations when a private person may make an arrest. (See Pen. Code, § 837.) If the second alternative is given, also give the bracketed paragraph defining "reasonable cause."

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 207(e)(2), 834, 837.
- Arrest by Actual Restraint or Submission to Custody. Pen. Code, § 835.
- Summoning Assistance in Making Arrest. Pen. Code, § 839.
- Burden of Proof. See *People v. Agnew* (1940) 16 Cal.2d 655, 665–666 [107 P.2d 601] [defendant need only raise reasonable doubt regarding lawfulness of arrest as defense to false imprisonment charge]; *People v. Tewksbury* (1976) 15 Cal.3d 953, 963–964 [127 Cal.Rptr. 135, 544 P.2d 1335].
- Presence Defined. *People v. Lee* (1984) 157 Cal.App.3d Supp. 9, 12 [204 Cal.Rptr. 667] [neither physical proximity nor sight is essential].
- Public Offense Defined. Pen. Code, § 15; see *People v. Tuck* (1977) 75 Cal.App.3d 639, 644 [142 Cal.Rptr. 362] [public offense includes felony, misdemeanor, or infraction].
- Reasonable Cause Defined. *People v. Wilkins* (1972) 27 Cal.App.3d 763, 767–768 [104 Cal.Rptr. 89] [proof of commission of felony not necessary when reasonable cause exists].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 248, 255.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][a] (Matthew Bender).

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C. FALSE IMPRISONMENT

1240. Felony False Imprisonment

The defendant is charged [in Count ____] with false imprisonment by violence or menace.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant intentionally [and unlawfully] (restrained[,]/ [or] confined[,]/ [or] detained) someone [or caused that person to be (restrained[,]/ [or] confined[,]/ [or] detained)] by violence or menace;**

AND

2. **The defendant made the other person stay or go somewhere against that person's will.**

Violence **means using physical force that is greater than the force reasonably necessary to restrain someone.**

Menace **means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.**

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[False imprisonment does not require that the person restrained be confined in jail or prison.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Haney* (1977) 75 Cal.App.3d 308, 312–313 [142 Cal.Rptr. 186] [failure to instruct on elements of violence,

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menace, fraud, or deceit necessary to establish felony false imprisonment requires reversal].)

Give the bracketed words "and unlawfully" in element 1 on request if there is evidence that the defendant acted lawfully. The court will need to further define for the jury when a restraint, detention, or confinement is legal.

Give the bracketed definition of "against a person's will" on request.

Give the final paragraph on request to inform jurors that false "imprisonment" is not limited to confinement in jail or prison. (*People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].)

Related Instructions

CALCRIM No. 1242, *Misdemeanor False Imprisonment*.

If the defendant is charged with false imprisonment for purposes of protection from arrest or use as a shield (Pen. Code, § 210.5), see CALCRIM No. 1241, *False Imprisonment: Hostage*.

AUTHORITY

- Elements. Pen. Code, §§ 236, 237; *People v. Agnew* (1940) 16 Cal.2d 655, 659–660 [107 P.2d 601].
- Confinement in Jail or Prison Not Required. *People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].
- General-Intent Crime. *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717–718 [31 Cal.Rptr.2d 677]; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400 [251 Cal.Rptr. 880]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768].
- Menace Defined. *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Violence Defined. *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 77–80.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][a], [b] (Matthew Bender).

COMMENTARY

The instruction includes a definition of "violence" because it has a specific meaning in the context of felony false imprisonment. In addition, force and violence are separate elements with different meanings that must be made clear to the jury. (*People v. Babich* (1993) 14 Cal.App.4th 801, 806–807 [18 Cal.Rptr.2d 60].) Force is required for a finding of both misdemeanor and felony false imprisonment, while violence is only required for the felony. "Violence" is a force greater than that reasonably necessary to effect the restraint. (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [10 Cal.Rptr.2d 922].)

A definition of "menace" is also included. Menace has a specific meaning in the context of felony false imprisonment. (*People v. Babich, supra,* 14 Cal.App.4th at p. 806.) Two categories of menace include a threat involving either the use of a deadly weapon or verbal threats of harm. (*People v. Matian* (1995) 35 Cal.App.4th 480, 485–486 [41 Cal.Rptr.2d 459].) "Menace" is not a mere modifier of "violence." (*People v. Arvanites* (1971) 17 Cal.App.3d 1052, 1060 [95 Cal.Rptr. 493].)

The committee found only one case that involved fraud and deceit. (*People v. Rios* (1986) 177 Cal.App.3d 445, 450–451 [222 Cal.Rptr. 913]; see also *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 409–410 [173 Cal.Rptr. 906].) Thus, this instruction focuses on the use of violence or menace to restrain the victim. If there is evidence of the use of fraud or deceit, the court must modify the instruction.

LESSER INCLUDED OFFENSES

- Attempted False Imprisonment. Pen. Code, §§ 664, 236, 237; *People v. Ross* (1988) 205 Cal.App.3d 1548, 1554–1555 [253 Cal.Rptr. 178] [present ability not prerequisite to attempted false imprisonment].
- Misdemeanor False Imprisonment. Pen. Code, § 236; *People v. Matian* (1995) 35 Cal.App.4th 480, 484, fn. 4, 487 [41 Cal.Rptr.2d 459]; *People v. Babich* (1993) 14 Cal.App.4th 801, 807 [18 Cal.Rptr.2d 60].

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RELATED ISSUES

Elder or Dependent Adult Victim

False imprisonment of an elder or dependent adult by use of violence, menace, fraud, or deceit is punishable by imprisonment for two, three, or four years. (Pen. Code, §§ 237(b), 368(f).) An elder is any person who is 65 years of age or older. (Pen. Code, § 368(g).) A dependent adult is any person between the ages of 18 and 64 with specified physical or mental limitations. (Pen. Code, § 368(h).)

Parent Confining Child

A parent who confines his or her child with the intent to endanger the health and safety of the child or for an unlawful purpose can be prosecuted for false imprisonment. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [84 Cal.Rptr.2d 491] [unlawful purpose of avoiding prosecution].) A parent asserting the defense of parental authority may introduce evidence of his or her intent in confining or restraining the child and of the reasonableness of the restraint or confinement. (*Id.* at p. 1196.) There is no sua sponte duty to instruct on the defense absent substantial evidence supporting the defense or reliance on it during the trial. (*Id.* at p. 1197.)

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1241. False Imprisonment: Hostage

The defendant is charged [in Count ____] with false imprisonment of a hostage.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant faced a threat or risk of imminent arrest;**
2. **The defendant (restrained[,]/ [or] confined[,]/ [or] detained) another person by force or by a threat to use force;**
3. **The defendant intended to protect (himself/herself) against the threat of imminent arrest by restraining the other person;**
4. **The defendant made the other person stay or go somewhere against that person's will;**

AND

5. **The defendant either substantially increased the risk of [physical or psychological] harm to the (restrained[,]/ [or] confined[,]/ [or] detained) person or intended to use that person as a shield.**

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[False imprisonment does not require that the person restrained be confined in jail or prison.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give the bracketed definition of "against a person's will" on request.

Give the final paragraph on request to inform jurors that false "imprisonment" is not limited to confinement in jail or prison. (*People v.*

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Agnew (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].)

AUTHORITY

- Elements. Pen. Code, §§ 210.5, 236.
- Imminent Arrest. *People v. Gomez* (1992) 2 Cal.App.4th 819, 825 [3 Cal.Rptr.2d 418] [dicta].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 81.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[1][c], [2][a], [b] (Matthew Bender).

COMMENTARY

Unlike simple false imprisonment, false imprisonment of a hostage is a specific intent crime. (See Pen. Code, § 210.5 [falsely imprison "for purposes of protection from arrest"]; see also *People v. McDaniel* (1979) 24 Cal.3d 661, 669 [156 Cal.Rptr. 865, 597 P.2d 124] [specific intent crime exists when defendant intends to do some further act or achieve some additional consequence].)

Section 210.5 does not expressly require a threat of arrest when a perpetrator commits false imprisonment "for purposes of using the person as a shield." Until the appellate courts provide more guidance, this instruction assumes that a threat of imminent arrest is required. (See *People v. Gomez* (1992) 2 Cal.App.4th 819, 825 [3 Cal.Rptr.2d 418] [dicta].)

LESSER INCLUDED OFFENSES

- False Imprisonment. Pen. Code, §§ 236, 237.
- Attempted False Imprisonment of Hostage. Pen. Code, §§ 664, 210.5, 236.

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1242. Misdemeanor False Imprisonment

The defendant is charged [in Count ____] with false imprisonment.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant intentionally [and unlawfully] (restrained[,]/ [or] detained[,]/ [or] confined) a person;**

AND

2. **The defendant's act made that person stay or go somewhere against that person's will.**

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[False imprisonment does not require that the person restrained or detained be confined in jail or prison.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed words "and unlawfully" in element 1 on request if there is evidence that the defendant acted lawfully. The court will need to further define for the jury when a restraint, detention, or confinement is legal.

Give the bracketed definition of "against a person's will" on request.

Give the final paragraph on request to inform jurors that false "imprisonment" is not limited to confinement in jail or prison. (*People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].)

AUTHORITY

- Elements. Pen. Code, §§ 236, 237(a); *People v. Agnew* (1940) 16 Cal.2d 655, 659–660 [107 P.2d 601].

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- General-Intent Crime. *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717–718 [31 Cal.Rptr.2d 677]; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400 [251 Cal.Rptr. 880]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768].
- Confinement in Jail or Prison Not Required. *People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney* (1977) 75 Cal.App.3d 308, 313 [142 Cal.Rptr. 186].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 77.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][a], [b] (Matthew Bender).

RELATED ISSUES

General-Intent Crime

False imprisonment is a general-intent crime. (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 716–718 [31 Cal.Rptr.2d 677]; *People v. Olivencia* (1988) 204 Cal.App.3d 1391 [251 Cal.Rptr. 880]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768].) Thus, the court is not required to instruct on the joint union of act and specific intent (*People v. Fernandez, supra,* 26 Cal.App.4th at p. 716), on the use of circumstantial evidence to prove specific intent (*People v. Swanson, supra,* 142 Cal.App.3d at pp. 109–110), or that the jury should consider mental illness in deciding whether the defendant acted with specific intent (*People v. Olivencia, supra,* 204 Cal.App.3d at p. 1399).

Parent Confining Child

A parent who confines his or her child with the intent to endanger the health and safety of the child or for an unlawful purpose can be prosecuted for false imprisonment. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [84 Cal.Rptr.2d 491] [unlawful purpose of avoiding prosecution]; see also *People v. Rios* (1986) 177 Cal.App.3d 445, 451 [222 Cal.Rptr. 913].) If there is sufficient evidence that the parent's restraint or confinement was a reasonable exercise of parental authority, the court has a **sua sponte** duty to instruct on that defense. (*People v. Checketts, supra,* 71 Cal.App.4th at p. 1196.)

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D. CHILD ABDUCTION

1250. Child Abduction: No Right to Custody

The defendant is charged [in Count ____] with child abduction without a right of custody.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant maliciously (took[,]/ [or] enticed away[,]/ [or] kept[,]/ [or] withheld[,]/ [or] concealed) a child from (his/her) lawful custodian;**
2. **The child was under the age of 18;**
3. **When the defendant acted, (he/she) did not have a right to custody of that child;**

AND

4. **When the defendant acted, (he/she) intended to detain or conceal the child from the child's lawful custodian.**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

A *lawful custodian* is a person, guardian, or public agency having a right to custody of the child. The *right to custody* means the right to physical care, custody, and control of the child according to the law or because of a court order. [A public agency has the right to custody if it has been given protective custody or jurisdiction of the care, custody, control, or conduct of the child by statute or court order.]

[*Intending to detain* includes delaying or hindering. A person can detain someone without using force.]

[To *entice away* means to lure away by creating hope or desire.]

[The defendant can be guilty of child abduction whether or not the child resisted or objected, and even if the child consented to go with the defendant.]

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[A parent has no right to physical custody if his or her parental rights were terminated by court order.]

[A parent loses his or her right to custody if he or she (is unable to take custody of the child[,]/ [or] refuses to take custody of the child[,]/ [or] abandons his or her family).]

[A parent *abandons* a child by actually deserting the child with the intent to cut off the relationship with the child and end all parental obligations. Intent to abandon can be shown in many ways, including, but not limited to:

1. **Leaving the child without providing a way for the child to be identified;**
2. **Leaving the child with the other parent for at least one year without communicating with or supporting the child;**

OR

3. **Leaving the child with someone other than a parent for at least six months without communicating with or supporting the child.]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If requested, give the final bracketed sentence at the end of the paragraph defining "lawful custodian" if a public agency was the lawful custodian at the time of the alleged abduction. (See Pen. Code, § 277(e).)

If requested, give the bracketed sentences defining "intending to detain" (see *People v. Moore* (1945) 67 Cal.App.2d 789, 791 [155 P.2d 403]) or "entice away" (see *People v. Torres* (1920) 48 Cal.App. 606, 609 [192 P. 175]) depending on the evidence in the case.

If requested, give the bracketed paragraph about the child's consent or lack of resistance if there is evidence the child did not resist or consented to go

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with the defendant. (*People v. Moore, supra,* 67 Cal.App.2d at p. 792 [child's consent irrelevant]; *People v. Grever* (1989) 211 Cal.App.3d Supp. 1, 7 [259 Cal.Rptr. 469].)

Give on request the bracketed paragraph that begins with "A parent loses his or her right to custody . . ." if there is evidence the defendant lost his or her right to custody by being unable or refusing to take custody, or by abandoning his or her family. (See Pen. Code, § 277(f).)

If there is evidence of abandonment, give the bracketed paragraphs defining when a parent "abandons" a child. The trial court must define abandonment **sua sponte** when it is closely connected to the evidence presented on the right to custody. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1319 [76 Cal.Rptr.2d 160].)

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Related Instructions

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1215, *Kidnapping*.

AUTHORITY

- Elements. Pen. Code, §§ 277, 278.
- Abandonment Defined. Fam. Code, § 7822(a), (b); *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1315–1316, 1320 [76 Cal.Rptr.2d 160].
- Court Order or Custody Order Defined. Pen. Code, § 277(b).
- Custody Proceeding Defined. Pen. Code, § 277(c).
- Maliciously Defined. Pen. Code, § 7(4).
- Person Defined. Pen. Code, § 277(i) [includes parent or parent's agent].
- Child's Consent Irrelevant. *People v. Moore* (1945) 67 Cal.App.2d 789, 791–792 [155 P.2d 403] [crime against parent]; *People v. Grever* (1989) 211 Cal.App.3d Supp. 1, 7 [259 Cal.Rptr. 469].

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- Detain Defined. *People v. Moore* (1945) 67 Cal.App.2d 789, 791 [155 P.2d 403] [includes delaying, hindering, or retarding but not necessarily the use of force].
- Entice Defined. *People v. Torres* (1920) 48 Cal.App. 606, 609 [192 P. 175].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 279–287.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][b], [c], [3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Child Abduction. Pen. Code, §§ 664, 278.

RELATED ISSUES

Custody Placed With Other Parent

Penal Code section 278 applies to a parent of a minor child whose custody has been placed with the other parent by court order. (*People v. Hyatt* (1971) 18 Cal.App.3d 618, 622 [96 Cal.Rptr. 156].) A parent with bare legal custody does not have a "right of custody" under the statute. (*People v. Irwin* (1984) 155 Cal.App.3d 891, 897 [202 Cal.Rptr. 475] [father only had joint legal custody; physical custody was awarded to the mother].)

Intent to Detain or Conceal Not Required

Proof of violation of section 278 does not require the intent to detain or conceal the child in California. Proof of detention or concealment, however, supports an inference of an intention to detain or conceal. (*People v. Hyatt* (1971) 18 Cal.App.3d 618, 623 [96 Cal.Rptr. 156] [construing former section 278 that required intent to detain "and" conceal].)

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1251. Child Abduction: By Depriving Right to Custody or Visitation

The defendant is charged [in Count ____] with depriving someone else of the right to (custody/ [or] visitation).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (took[,]/ [or] enticed away[,]/ [or] kept[,]/ [or] withheld[,]/ [or] concealed) a child;**
2. **The child was under the age of 18;**

AND

3. **When the defendant acted, (he/she) maliciously (deprived a lawful custodian of (his/her/its) right to custody/ [or] deprived a person of a lawful right to visitation).**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

A *lawful custodian* is a person, guardian, or public agency that has a right to custody of the child. The *right to custody* means the right to physical care, custody, and control of the child according to the law or because of a court order. [A public agency has the right to custody if it has been given protective custody or jurisdiction of the care, custody, control, or conduct of the child by statute or court order.]

[To *entice away* means to lure away by creating hope or desire.]

[The defendant can be guilty of child abduction whether or not the child resisted or objected, and even if the child consented to go with the defendant.]

[*Visitation* means the time ordered by a court granting someone access to the child.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If requested, give the final bracketed sentence in the paragraph defining "lawful custodian" if there is evidence that a public agency was the lawful custodian at the time of the alleged abduction. (See Pen. Code, § 277(e).)

If requested, give the bracketed paragraph defining "entice away" (see *People v. Torres* (1920) 48 Cal.App. 606, 609 [192 P. 175]) depending on the evidence in the case.

If requested, give the bracketed paragraph about the child's consent or lack of resistance if there is evidence the child did not resist or consented to go with the defendant. (*People v. Moore* (1945) 67 Cal.App.2d 789, 792 [155 P.2d 403] [child's consent irrelevant]; *People v. Grever* (1989) 211 Cal.App.3d Supp. 1, 7 [259 Cal.Rptr. 469].)

If requested, give the bracketed paragraph regarding visitation if evidence is presented that the defendant deprived another person of his or her right to visitation. (See Pen. Code, §§ 277(h), 278.5(a).)

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Pen. Code, §§ 277, 278.5.
- Court Order or Custody Order Defined. Pen. Code, § 277(b).
- Custody Proceeding Defined. Pen. Code, § 277(c).
- Maliciously Defined. Pen. Code, § 7(4).
- Person Defined. Pen. Code, § 277(i) [includes parent or an agent of a parent].
- Child's Consent Irrelevant. *People v. Moore* (1945) 67 Cal.App.2d 789, 792 [155 P.2d 403] [crime against parent]; *People v. Grever* (1989) 211 Cal.App.3d Supp. 1, 7 [259 Cal.Rptr. 469].

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Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 288–290.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][b], [c], [3] (Matthew Bender).

COMMENTARY

A crime under Penal Code section 278.5 is sometimes referred to as "child detention." (See *People v. Moses* (1996) 43 Cal.App.4th 462, 464, fn. 2 [50 Cal.Rptr.2d 665].) This instruction uses the phrase "depriving someone else of the right to (custody/ [or] visitation)" to avoid any confusion with detention under Penal Code section 278, the general child abduction statute.

LESSER INCLUDED OFFENSES

- Attempted Child Detention. Pen. Code, §§ 664, 278.5.

Section 278.5 does not limit the court's contempt power. (Pen. Code, § 278.5(b).) Contempt is not a lesser included offense of a crime under section 278.5. There is no sua sponte duty to instruct on contempt. (*People v. Moses* (1996) 43 Cal.App.4th 462, 469, 471 [50 Cal.Rptr.2d 665].)

RELATED ISSUES

Custody Order After Abduction

A custody order obtained after the abduction of a child is not a defense to a crime charged under section 278.5. (Pen. Code, § 278.5(c).)

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1252. Defense to Child Abduction: Protection From Immediate Injury

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The defendant did not maliciously deprive a (lawful custodian of a right to custody/ [or] person of a right to visitation) if the defendant:

1. **Had a right to custody of the child when (he/she) abducted the child;**
2. **Had a good faith and reasonable belief when abducting the child that the child would suffer immediate bodily injury or emotional harm if left with the other person;**
3. **Made a report to the district attorney's office in the county where the child lived within a reasonable time after the abduction;**
4. **Began a custody proceeding in an appropriate court within a reasonable time after the abduction;**

AND

5. **Informed the district attorney's office of any change of address or telephone number for (himself/herself) and the child.**

To *abduct* means to take, entice away, keep, withhold, or conceal.

The *right to custody* means the right to physical care, custody, and control of the child because of a court order or under the law.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

[One way a child may suffer *emotional harm* is if he or she has a parent who has committed domestic violence against the parent accused of abducting the child. Acts of "domestic violence" include, but are not limited to (1) sexual assault; (2) causing or attempting to cause bodily injury, either intentionally or recklessly; or (3) causing a person to reasonably fear imminent serious bodily injury to himself or herself or another.]

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[The report to the district attorney must include the defendant's name, the defendant's or child's current address and telephone number, and the reasons the child was abducted.]

[A reasonable time within which to make a report to the district attorney's office is at least 10 days from when the defendant took the child.]

[A reasonable time to begin a custody proceeding is at least 30 days from the time the defendant took the child.]

The People have the burden of proving beyond a reasonable doubt that the defendant maliciously deprived a (lawful custodian of a right to custody/ [or] person of a right to visitation). If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime charged*>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on this defense if the defendant is relying on it, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (See *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 965 [124 Cal.Rptr.2d 683]; *People v. Sedeno* (1974) 10 Cal.3d 703, 715–716 [112 Cal.Rptr. 1, 518 P.2d 913] [duty to instruct on defenses], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1] and in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10, 164–178 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Give on request the bracketed paragraph regarding "emotional harm" and "domestic violence" if there is evidence that the defendant had been a victim of domestic violence committed by the other parent. (See Pen. Code, §§ 278.7(b), 277(j); Fam. Code, §§ 6203, 6211.)

If there is issue about whether the defendant made a report to the district attorney's office or began custody proceedings within a reasonable time after the abduction, give either or both of the final two bracketed paragraphs on request. (See Pen. Code, § 278.7(c)(1), (2).)

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AUTHORITY

- Instructional Requirements. Pen. Code, § 278.7.
- Abduct Defined. Pen. Code, § 277(k).
- Court Order or Custody Order Defined. Pen. Code, § 277(b).
- Domestic Violence Defined. Pen. Code, § 277(j); see Fam. Code, §§ 6203, 6211.
- Person Defined. Pen. Code, § 277(i) [includes parent or parent's agent].
- Right to Custody Defined. Pen. Code, § 277(e); see *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 964 [124 Cal.Rptr.2d 683] [liberal visitation period does not constitute right to custody].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 292.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][a] (Matthew Bender).

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CRIMINAL THREATS AND HATE CRIMES

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A. THREATENING, STALKING, OR TERRORIZING

1300. Criminal Threat

The defendant is charged [in Count ____] with having made a criminal threat.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ <*insert name of complaining witness*>;**
2. **The defendant made the threat to _____ <*insert name of complaining witness*> (orally/in writing/by electronic communication device);**
3. **The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____ <*insert name of complaining witness*>];**
4. **The threat was so clear, immediate, unconditional, and specific that it communicated to _____ <*insert name of complaining witness*> a serious intention and the immediate prospect that the threat would be carried out;**
5. **The threat actually caused _____ <*insert name of complaining witness*> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];**

AND

6. **_____'s <*insert name of complaining witness*> fear was reasonable under the circumstances.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

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Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Sustained fear **means fear for a period of time that is more than momentary, fleeting, or transitory.**

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

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Give the bracketed definition of "electronic communication" on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining "immediate family" should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

AUTHORITY

- Elements. Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances. *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard. *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threat Not Required to Be Unconditional. *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Conditional Threat May Be True Threat, Depending on Context. *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required. *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear. *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th

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1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].

- Verbal Statement, Not Mere Conduct, Is Required. *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague. *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 22.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[1] (Matthew Bender).

COMMENTARY

This instruction uses the current nomenclature "criminal threat," as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called "terrorist threat"]. (See also Stats. 2000, ch. 1001, § 4.)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat. See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that

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referenced school shootings. The court held that "the text of the poem, understood in light of the surrounding circumstances, was not 'as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.' " (*Id.* at p. 638.)

Related Statutes

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

Whether Threat Actually Received

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

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1301. Stalking

The defendant is charged [in Count ____] with stalking.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person;**

[AND]

2. **The defendant made a credible threat with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family](;/.)**

<Give element 3 if the defendant is charged with stalking in violation of a court order, Pen. Code, § 646.9(b).>

[AND]

[3. A/An (temporary restraining order/injunction/_____ *<describe other court order>*) prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct(;/.)]

<Give element 4 when instructing on conduct that was constitutionally protected.>

[AND

4. **The defendant's conduct was not constitutionally protected.]**

A *credible threat* is one that causes the target of the threat to reasonably fear for his or her safety [or for the safety of his or her immediate family] and one that the maker of the threat appears to be able to carry out.

A *credible threat* may be made orally, in writing, or electronically or may be implied by a pattern of conduct or a combination of statements and conduct.

***Harassing* means engaging in a knowing and willful course of conduct directed at a specific person that seriously annoys,**

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alarms, torments, or terrorizes the person and that serves no legitimate purpose. A course of conduct means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure someone else.

[_____ <*Describe type of activity; see Bench Notes below*> is constitutionally protected activity.]

[*Repeatedly* means more than once.]

[The People do not have to prove that a person who makes a threat intends to actually carry it out.]

[Someone who makes a threat while in prison or jail may still be guilty of stalking.]

[A threat may be made electronically by using a telephone, cellular telephone, pager, computer, video recorder, fax machine, or other similar electronic communication device.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers, and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

[The terms and conditions of (a/an) (restraining order/injunction/_____ <*describe other court order*>) remain enforceable despite the parties' actions, and may only be changed by court order.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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Give element 3 if the defendant is charged with stalking in violation of a temporary restraining order, injunction, or any other court order. (See Pen. Code, § 646.9(b).)

If the defendant argues that his or her conduct or threat was constitutionally protected, give element 4. (See Pen. Code, § 646.9(f), (g).) The court must then further instruct on the type of constitutionally protected activity involved. (See the optional bracketed paragraph regarding constitutionally protected activity.) Examples of constitutionally protected activity include speech, protest, and assembly. (See Civ. Code, § 1708.7(f) [civil stalking statute].)

The bracketed sentence that begins with "The People do not have to prove that" may be given on request. (See Pen. Code, § 646.9(g).)

The bracketed sentence about the defendant's incarceration may be given on request if the defendant was in prison or jail when the threat was made. (See Pen. Code, § 646.9(g).)

Give the bracketed definition of "electronic communication" on request. (See Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining "immediate family" should be given on request. (See Pen. Code, § 646.9(*l*); see Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If the defendant argues that the alleged victim acquiesced to contact with the defendant contrary to a court order, the court may, on request, give the last bracketed paragraph stating that such orders may only be changed by the court. (See Pen. Code, § 13710(b); *People v. Gams* (1996) 52 Cal.App.4th 147, 151–152, 154–155 [60 Cal.Rptr.2d 423].)

AUTHORITY

- Elements. Pen. Code, § 646.9(a), (e)–(h); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239 [89 Cal.Rptr.2d 806].
- Intent to Cause Victim Fear. *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624]; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1236, 1238–1240 [44 Cal.Rptr.2d 328]; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171–173 [67 Cal.Rptr.2d 872] [evidence of past violence toward victim].

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- Repeatedly Defined. *People v. Heilman* (1994) 25 Cal.App.4th 391, 399, 400 [30 Cal.Rptr.2d 422].
- Safety Defined. *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719–720 [91 Cal.Rptr.2d 851]; see *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295 [60 Cal.Rptr.2d 624].
- Substantial Emotional Distress Defined. *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; see *People v. Carron* (1995) 37 Cal.App.4th 1230, 1240–1241 [44 Cal.Rptr.2d 328].
- Victim's Fear Not Contemporaneous With Stalker's Threats. *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 294–297.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Stalking. Pen. Code, §§ 664, 646.9.

RELATED ISSUES

Harassment Not Contemporaneous With Fear

The harassment need not be contemporaneous with the fear caused. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].)

Constitutionality of Terms

The term "credible threat" is not unconstitutionally vague. (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1230 [61 Cal.Rptr.2d 176].) The element that the objectionable conduct "serve[] no legitimate purpose" (Pen. Code, § 646.9(e) is also not unconstitutionally vague; "an ordinary person can reasonably understand what conduct is expressly prohibited." (*People v. Tran* (1996) 47 Cal.App.4th 253, 260 [54 Cal.Rptr.2d 650].)

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Labor Picketing

Section 646.9 does not apply to conduct that occurs during labor picketing. (Pen. Code, § 646.9(i).)

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1302. Terrorizing by Destructive Device, Explosive, or Arson

The defendant is charged [in Count ____] with terrorizing by (use of (a/an) (destructive device/ [or] explosive)/committing arson).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—destructive device or explosive>

[1. The defendant exploded or ignited [or attempted to explode or ignite] (a/an) (destructive device/ [or] explosive);]

<Alternative 1B—arson>

[1. The defendant committed arson;]

2. The defendant (used [or attempted to use] the (device/ [or] explosive)/committed the arson) in or around _____ <*insert one or more of the places listed in Pen. Code, § 11413(b)*>;

AND

3. The defendant committed these acts with the intent to terrorize someone else or with reckless disregard of terrorizing someone else.

To terrorize **means to cause a person of ordinary emotions and sensibilities to fear for his or her personal safety.**

A person acts with *reckless disregard* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk, (2) he or she ignores that risk, and (3) the person's behavior is grossly different from what a reasonable person would have done in the same situation.

To decide whether the defendant (exploded or ignited [or attempted to explode or ignite] (a/an) (destructive device/ [or] explosive)/committed arson), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

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[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> **is an *explosive*.]**

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>**.]**

[_____ <*insert type of destructive device from Pen. Code, § 12301*> **is a *destructive device*.]**

[The term[s] (*explosive/* [and] *destructive device*) (is/are) defined in another instruction.]

[*Judicial officer* means a magistrate, judge, justice, commissioner, or referee of a state or federal court located in this state, or a person appointed by a court to serve in one of these capacities.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give alternative 1A or 1B depending on whether the defendant is charged with exploding or igniting a destructive device or explosive, or with committing arson. Give all relevant instructions on the offense alleged. (For arson, see CALCRIM No. 1500, et seq.; for exploding or igniting destructive devices and explosives, see CALCRIM No. 2500, et seq.)

In element 2, insert one or more of the places specifically protected against terrorizing. (See Pen. Code, § 11413(b).) These places are:

1. Any health facility licensed under Health and Safety Code section 1250 et seq., or any place where medical care is provided by a licensed health care professional.

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2. Any church, temple, synagogue, or other place of worship.
3. The buildings, offices, and meeting sites of organizations that counsel for or against abortion or among whose major activities are lobbying, publicizing, or organizing with respect to public or private issues relating to abortion.
4. Any place at which a lecture, film-showing, or other private meeting or presentation that educates or propagates with respect to abortion practices or policies, whether on private property or at a meeting site authorized for specific use by a private group on public property, is taking place.
5. Any bookstore or public or private library.
6. Any building or facility designated as a courthouse.
7. The home or office of a judicial officer.
8. Any building or facility regularly occupied by county probation department personnel in which the employees perform official duties of the probation department.
9. Any private property, if the property was targeted because of the race, color, religion, ancestry, national origin, disability, gender, or sexual orientation of the owner or occupant of the property.
10. Any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People*

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v. Dimitrov, supra, 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p.25 [39 Cal.Rptr.2d 257].) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

If it is alleged in element 2 that the home or office of a judicial officer was attacked (Pen. Code, § 11413(b)(7)), the final bracketed paragraph defining "judicial officer" (see Pen. Code, § 11413(c)) may be given on request.

Related Instructions

Penal Code section 11413 does not prohibit prosecution under Penal Code section 12303.3 or any other provision of law. (Pen. Code, § 11413(e).) Section 12303.3 prohibits the possession or explosion of any destructive device or explosive with the intent to injure or terrify any person, or with the intent to injure or destroy property. For instructions relating to the wrongful possession or explosion of destructive devices or explosives, see series 2500, Weapons, Destructive Devices, and Explosives.

AUTHORITY

- Elements. Pen. Code, § 11413.
- Destructive Device Defined. Pen. Code, § 12301.
- Explosive Defined. Health & Saf. Code, § 12000.
- Definition of Reckless Disregard per Pen. Code, § 11411(c). *People v. Carr* (2000) 81 Cal.App.4th 837, 845–846 [97 Cal.Rptr.2d 143] [noting that voluntary intoxication is not a defense to violations of Pen. Code, § 11411].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 17, 20.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[3][a][i] (Matthew Bender).

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LESSER INCLUDED OFFENSES

Arson and Attempted Arson. Pen. Code, §§ 451, 455 [when arson is charged conduct].

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1303. Terrorism by Symbol

The defendant is charged [in Count ____] with terrorizing by use of a symbol.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant placed or displayed a sign, mark, symbol, emblem, or physical impression on the private property of another person;**
2. **The defendant did not have authorization to place or display the sign, symbol, emblem or physical impression on the property;**

[AND]

3. **The defendant committed (this/these) act[s] with the intent to terrorize the owner or occupant of the property [or with reckless disregard of the risk of terrorizing the owner or occupant of the property].**

<Include the fourth element in Penal Code section 11411(b) prosecutions>

[AND

4. **The defendant committed these acts on two or more occasions.]**

To terrorize **means to cause a person of ordinary emotions and sensibilities to fear for his or her personal safety.**

<Alternative A—Reckless Disregard: General Definition>

[A person acts with *reckless disregard* when (1) he or she knows there is a substantial and unjustifiable risk that his or her act will terrorize the owner or occupant, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B—Reckless Disregard: Voluntary Intoxication>

[A person acts with *reckless disregard* when (1) he or she does an act that presents a substantial and unjustifiable risk of

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terrorizing the owner or occupant, and (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give alternative A or B depending on whether or not there is evidence that the defendant was voluntary intoxicated.

The legislature included the Nazi swastika as an example of a prohibited symbol.

Although Pen. Code, § 11411 states that reckless disregard may provide the necessary mental state for committing this crime, this provision may run counter to the Supreme Court's holding in *Virginia v. Black* (2003) 538 U.S. 343, 365–366 [123 S.Ct. 1536, 155 L.Ed.2d 535] [without specific intent requirement, statute prohibiting cross burning was unconstitutional.]

AUTHORITY

- Elements. Pen. Code, §§ 11411(a) & (b).
- Definition of Reckless Disregard per Pen. Code, § 11411(c). *People v. Carr* (2000) 81 Cal.App.4th 837, 845–846 [97 Cal.Rptr.2d 143] [noting that voluntary intoxication is not a defense to violations of Pen. Code, § 11411].
- Requirement of Specific Intent. *Virginia v. Black* (2003) 538 U.S. 343, 365–366 [123 S.Ct. 1536, 155 L.Ed.2d 535].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 18.

(New August 2006)

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1304. Cross Burning and Religious Symbol Desecration

The defendant is charged [in Count ____] with (terrorism by cross burning/terrorism by religious symbol desecration).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative A—Private Property>

1. **The defendant burned or desecrated a religious symbol on the private property of another person;**
2. **The defendant knew the object that he or she burned or desecrated was a religious symbol;**
3. **The defendant did not have authorization to burn or desecrate the religious symbol on the property; and**
4. **The defendant committed (this/these) act[s] with the intent to terrorize the owner or occupant of the property [or with reckless disregard of the risk of terrorizing the owner or occupant of the property].**

<Alternative B—School Grounds>

1. **The defendant burned or desecrated a religious symbol on the property of a primary school, junior high school, middle school, or high school;**
2. **The defendant knew the object that he or she burned or desecrated was a religious symbol; and**
3. **The defendant committed (this/these) act[s] with the intent to terrorize someone who attends the school, works at the school or is associated with the school.**

To terrorize **means to cause a person of ordinary emotions and sensibilities to fear for his or her personal safety.**

<Alternative A—Reckless Disregard: General Definition>

[A person acts with *reckless disregard* when (1) he or she knows there is a substantial and unjustifiable risk that his or her act will terrorize the owner or occupant, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

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<Alternative B—Reckless Disregard: Voluntary Intoxication>

[A person acts with *reckless disregard* when (1) he or she does an act that presents a substantial and unjustifiable risk of terrorizing the owner or occupant, but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give alternative A or B regarding reckless disregard depending on whether or not there is evidence that the defendant was voluntary intoxicated.

Although Pen. Code, § 11411 states that reckless disregard may provide the necessary mental state for committing this crime, this provision may run counter to the Supreme Court's holding in *Virginia v. Black* (2003) 538 U.S. 343, 365–366 [123 S.Ct. 1536, 155 L.Ed.2d 535] [without specific intent requirement, statute prohibiting cross burning was unconstitutional.]

AUTHORITY

- Elements. Pen. Code, § 11411(c).
- Definition of Reckless Disregard per Pen. Code, § 11411(c). *People v. Carr* (2000) 81 Cal.App.4th 837, 845–846 [97 Cal.Rptr.2d 143] [noting that voluntary intoxication is not a defense to violations of Pen. Code, § 11411].
- Requirement of Specific Intent. *Virginia v. Black* (2003) 538 U.S. 343, 365–366 [123 S.Ct. 1536, 155 L.Ed.2d 535].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 18.

(New August 2006)

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1305. Obstructing Religion by Threat

The defendant is charged [in Count ____] with obstructing religion by threat.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant caused or attempted to cause a person to refrain from (exercising his or her religion/engaging in a religious service) by threatening to inflict an unlawful injury upon that person or upon property;**
2. **The defendant directly communicated the threat to that person;**
3. **The person reasonably believed the threat could be carried out; and**

<Alternative A—Exercising religion>

4. **At the time the defendant made the threat, (he/she) intended to cause the person to refrain from exercising his or her religion.**

<Alternative B—Religious service>

4. **At the time the defendant made the threat, (he/she) intended to cause the person to refrain from engaging in a religious service.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give alternative A or B depending on the alleged intent of the defendant.

AUTHORITY

- Elements. Pen. Code, § 11412.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 19.

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B. HATE CRIMES

1350. Hate Crime: Misdemeanor Interference With Civil Rights by Force

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The defendant is charged [in Count ____] with interfering with another person's civil rights by the use of force.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used force to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____ <*describe the right allegedly infringed, e.g., "be free from violence or bodily harm"*>, established by the law or Constitution of California or the United States;**
2. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

3. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

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AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or[meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

If the prosecution is based on the defendant's speech alone, do not give this instruction. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].) Give CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat.*

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined.*

AUTHORITY

- Elements. Pen. Code, § 422.6(a).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).

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- Association With Defined. Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required. *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Not Limited to "Significant Constitutional Rights." *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional. *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

RELATED ISSUES

Defendant Need Not Know He or She Is Violating the Law

" '[S]pecific intent' under the statute does not require an actual awareness on the part of the defendant that he is violating another's constitutional rights. It is enough that he engages in activity that interferes with rights clearly and specifically protected by the laws of the United States." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 948 [2 Cal.Rptr.2d 629].) "It is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority." (*Id.* at p. 949.)

Penal Code Section 654

In *In re M.S.* (1995) 10 Cal.4th 698, 727 [42 Cal.Rptr.2d 355, 896 P.2d 1365], the court rejected the argument that Penal Code section 654 does not apply to convictions under Penal Code section 422.6. In 2004, the Legislature amended the statute to add subdivision (d), which specifically states that Penal Code section 654 applies to convictions under Penal Code section 422.6.

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1351. Hate Crime: Misdemeanor Interference With Civil Rights by Threat

The defendant is charged [in Count ____] with interfering with another person's civil rights by threatening violence.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant threatened physical violence against a specific person [or a specific group of people];**
2. **The threat would have caused a reasonable person to be afraid because the defendant appeared able to carry out the threat;**
3. **The defendant used the threat to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____ <*describe the right allegedly infringed, e.g., "be free from violence or bodily harm"*>, established by the law or Constitution of California or the United States;**
4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a**

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person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or[private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

Give this instruction if the prosecution is based on the defendant's speech alone. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined.*

AUTHORITY

- Elements. Pen. Code, § 422.6(a) & (c).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).

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- Specific Intent to Deprive Individual of Protected Right Required. *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Requirements for Threat of Violence. Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Not Limited to "Significant Constitutional Rights." *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional. *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

(New January 2006)

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1352. Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property

The defendant is charged [in Count ____] with interfering with another person's civil rights by damaging property.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (defaced[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by another person;**
2. **The defendant knew that (he/she) was (defacing[,]/ [or] damaging[,]/ [or] destroying) property that was (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by that person;**
3. **The defendant did so for the purpose of interfering with [or intimidating] that person's free exercise or enjoyment of the right [or privilege] to _____ <*describe the right allegedly infringed, e.g., "be free from violence or bodily harm"*>, established by the law or Constitution of California or the United States;**
4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a**

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person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender,* as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined.*

AUTHORITY

- Elements. Pen. Code, § 422.6(b).
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required. *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Not Limited to "Significant Constitutional Rights." *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].

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- Statute Constitutional. *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Victim Need Not Own Property. *In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

RELATED ISSUES

Target of Intimidation Need Not Own Property

"[T]he phrase 'property of any other person' in section 422.6, subdivision (b) does not require that the victim own the property. As long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope." (*In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [42 Cal.Rptr.2d 355, 896 P.2d 1365] [classroom was the "property of" the students whose class met there].)

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

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1353. Hate Crime: Disability Defined

The term *disability* includes a (mental/ [or] physical) disability.

<Alternative A—mental disability>

[A person has a *mental disability* if he or she has a mental or psychological condition that limits a major life activity. The term *mental disability* includes (mental retardation[,]/ [and] organic brain syndrome[,]/ [and] emotional or mental illness[,]/ [and] specific learning disabilities).]

<Alternative B—physical disability>

[A person has a *physical disability* if he or she has (a physiological (disease[,]/ [or] disorder[,]/ [or] condition)[;]/ [or] a cosmetic disfigurement[;]/ [or] an anatomical loss) that:

1. **Affects one or more of the following body systems: (neurological[(,/;)]/ immunological[(,/;)]/ musculoskeletal[(,/;)]/ sensory, primarily the special sense organs[(,/;)]/ respiratory, including speech organs[(,/;)]/ cardiovascular[(,/;)]/ reproductive[(,/;)]/ digestive[(,/;)]/ genitourinary[(,/;)]/ hemic and lymphatic[(,/;)]/ skin[(,/;)]/ [or] endocrine);**

AND

2. **Limits a major life activity.]**

***Major life activities* include physical, mental, and social activities, including but not limited to working.**

A (disease[,]/ [or] disorder[,]/ [or] condition) *limits* a major life activity if it makes participation in the major life activity difficult.

[In deciding whether a (disease[,]/ [or] disorder[,]/ [or] condition) *limits* a major life activity, do not consider whether the limitation can be overcome with medications, assistive devices, reasonable accommodations, or other mitigating measures. [However, if a mitigating measure itself limits a major life activity, you may consider this as evidence that the (disease[,]/ [or] disorder[,]/ [or] condition) limits a major life activity.]]

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[A person has a *disability* if he or she has a (mental or psychological condition/ [or] health impairment) that requires special education or related services.]

[A person has a *disability* if _____ <*insert description of other condition not covered by the foregoing but included in Americans With Disabilities Act (ADA) of 1990*>.]

[*Disability* does not include (sexual behavior disorders[,]/ [or] compulsive gambling[,]/ [or] kleptomania[,]/ [or] pyromania[,]/ [or] psychoactive substance–use disorders resulting from the current unlawful use of controlled substances or other drugs).]

BENCH NOTES

Instructional Duty

Give this instruction when using the term "disability" in any other instruction.

If the case involves a person with a mental disability, give alternative A. If the case involves a person with a physical disability, give alternative B.

Give any of the bracketed paragraphs on request.

AUTHORITY

- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Mental Disability. Gov. Code, § 12926(i).
- Physical Disability. Gov. Code, § 12926(k).
- Disability Includes Anything Covered by ADA. Gov. Code, § 12926(*l*).

Secondary Sources

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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1354. Hate Crime Allegation: Felony

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the crime[s] committed by the defendant (was a/were) hate crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime] the People must prove that the defendant committed that crime in whole or in part because of the alleged victim's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]).

As used here, *victim* includes, but is not limited to, a (person[,]/ [or] individual[,]/ [or] family[,]/ [or] group[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] entity[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other victim or intended victim of the crime).

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the victim if:

1. **The defendant was biased against the victim based on the victim's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]);**

AND

2. **The bias motivation caused the defendant to commit the alleged acts.**

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been

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a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

[If you conclude that the People have proved that the crime[s] committed by the defendant (was a/were) hate crime[s], you must also decide whether the defendant voluntarily acted together with another person by either personally committing the crime or by aiding and abetting another person in committing the crime.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) This statute was substantially revised, effective January 1, 2005.

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined.*

If the prosecution alleges that the defendant acted in concert with another, pursuant to Penal Code section 422.75(b), give the bracketed sentence that begins with "If you conclude that the People have proved." Give all relevant instructions on aiding and abetting. The jury must be provided with a verdict form on which it may indicate whether this factor has also been proved.

If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.75(d), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

Related Instructions

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat.*

CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damage to Property*.

CALCRIM No. 1355, *Hate Crime Allegation: Misdemeanor*.

AUTHORITY

- Enhancement. Pen. Code, § 422.75(a)–(c).
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896

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P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

- Victim Defined. Pen. Code, § 422.56(i).
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense. See *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Aiding and Abetting. *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Acting in Concert. See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341 [122 Cal.Rptr. 658] [construing sodomy-in-concert statute]; *People v. Lopez* (1981) 116 Cal.App.3d 882, 886 [172 Cal.Rptr. 374] [construing rape-in-concert statute].
- No Specific Intent Required. *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 740–741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 305.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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1355. Hate Crime Allegation: Misdemeanor

If you find the defendant guilty of _____ <*insert offense[s]*> [as charged in Count[s] ____], you must then decide whether the People have proved the additional allegation that the crime[s] committed by the defendant (was a/were) hate crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime], the People must prove that:

1. **When committing that crime, the defendant intended to interfere with [or intimidate] another person's free exercise or enjoyment of the right [or privilege] to _____ <*describe the right raised by the evidence*>, established by the law or Constitution of California or the United States;**

[AND]

2. **The defendant acted in whole or in part because of the other person's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s])(;/.)**

[AND

<Alternative 3A—caused physical injury>

[3. When committing that crime, the defendant caused an actual physical injury or had the ability at that time to cause a violent injury.]

<Alternative 3B—caused property damage>

[3. The defendant caused property damage in excess of $400.]

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or]**

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religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

The People have the burden of proving each allegation beyond a

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reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324] [statute defines enhancement, not separate offense].) This enhancement makes a crime "committed against the person or property of another" that would otherwise be a misdemeanor into a misdemeanor-felony "wobbler." (Pen. Code, § 422.7.) This statute was substantially revised, effective January 1, 2005.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43 & 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give element 3A if the prosecution alleges that the crime was committed "against a person" and caused injury or included "the present ability to commit a violent injury." (Pen. Code, § 422.7(a)). Give element 3B if the prosecution alleges property damage exceeding $400. (Pen. Code, § 422.7(b).) If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.7(c), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined.*

Related Instructions

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat.*

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CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property*.

CALCRIM No. 1354, *Hate Crime Allegation: Felony*.

AUTHORITY

- Enhancement. Pen. Code, § 422.7.
- Hate Crime Defined. Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [896 P.2d 1387].
- Disability Defined. Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined. Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined. Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. Pen. Code, § 422.56(f).
- Religion Defined. Pen. Code, § 422.56(g).
- Sexual Orientation Defined. Pen. Code, § 422.56(h).
- Association With Defined. Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense. *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Intent to Deprive Individual of Protected Rights. *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1268 [40 Cal.Rptr.2d 793]; *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1742 [17 Cal.Rptr.2d 291].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- The underlying misdemeanor, and the attempt of the underlying misdemeanor (see Pen. Code, § 664), are lesser included offenses of a violation of Penal Code section 422.7.

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CRIMINAL STREET GANGS

1400. Active Participation in Criminal Street Gang
1401. Felony Committed for Benefit of Criminal Street Gang
1402. Gang-Related Firearm Enhancement
1403. Limited Purpose of Evidence of Gang Activity
1404–1499. Reserved for Future Use

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1400. Active Participation in Criminal Street Gang

The defendant is charged [in Count ____] with participating in a criminal street gang.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant actively participated in a criminal street gang;**
2. **When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

<If criminal street gang has already been defined>

[A *criminal street gang* is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**
2. **That has, as one or more of its primary activities, the commission of _____** *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>***;**

AND

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3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25)>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>*;

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25)>*

AND

[at least one of the following crimes:] _____ *<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>*;

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions or were personally committed by two or more persons.]

The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the

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alleged criminal street gang at the time when such activity was taking place.

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

***Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]: _____ <*insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted*>.**

To decide whether a member of the gang [or the defendant] committed _____ <*insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(30) inserted in definition of pattern of criminal gang activity*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

To prove that the defendant willfully assisted, furthered, or promoted a crime, the People must prove that:

1. **A member of the gang committed the crime;**
2. **The defendant knew that the gang member intended to commit the crime;**
3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the commission of the crime.**

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Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

2. **He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].)

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In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "criminal street gang," "pattern of criminal gang activity," or "felonious criminal conduct."

On request, give the bracketed paragraph that begins with "The People do not need to prove that the defendant devoted all or a substantial part of . . . ." (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

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Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with "If you conclude that defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is charged with an enhancement under 186.22(b), use CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*.

For additional instructions relating to liability as an aider and abettor, see the Aiding and Abetting series (CALCRIM No. 400 et seq.).

AUTHORITY

- Elements. Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined. Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined. Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].

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- Felonious Criminal Conduct Defined. *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03 (Matthew Bender).

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran, supra,* 97 Cal.App.4th at p. 1458 [original italics].)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang.

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(*People v. Burnell* (2005) 132 Cal.App.4th 938, 944–945 [34 Cal.Rptr.3d 40].)

RELATED ISSUES

Conspiracy

Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and CALCRIM No. 415, *Conspiracy*.)

Labor Organizations or Mutual Aid Activities

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Related Gang Crimes

Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

Unanimity

The "continuous-course-of-conduct exception" applies to the "pattern of criminal gang activity" element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)

(Revised August 2006)

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1401. Felony Committed for Benefit of Criminal Street Gang

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those crime[s])][,][or the lesser offense[s] of _____ <*insert lesser offense[s]*>**], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

[You must also decide whether the crime[s] charged in Count[s] ____ (was/were) committed on the grounds of, or within 1,000 feet of a public or private (elementary/ [or] vocational/ [or] junior high/ [or] middle school/ [or] high) school open to or being used by minors for classes or school-related programs at the time.]

To prove this allegation, the People must prove that:

1. **The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang;**

AND

2. **The defendant intended to assist, further, or promote criminal conduct by gang members.**

<*If criminal street gang has already been defined*>

[A criminal street gang is defined in another instruction to which you should refer.]

<*If criminal street gang has not already been defined in another instruction*>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**

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2. That has, as one or more of its primary activities, the commission of _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)*>;

AND

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,] [or]/ attempted commission of[,] [or]/conspiracy to commit[,] [or]/ solicitation to commit[,] [or]/conviction of[,] [or]/ (Having/having) a juvenile petition sustained for commission of):

<*Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25)*>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)*>;

[OR]

<*Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)*>

1B. [at least one of the following crimes:] _____ <*insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25)*>

AND

[at least one of the following crimes:] _____ <*insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)*>;

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

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4. The crimes were committed on separate occasions or were personally committed by two or more persons.]

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[The People need not prove that the defendant is an active or current member of the alleged criminal street gang.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

To decide whether a member of the gang [or the defendant] committed _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(30)***>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra,* 26 Cal.4th at 323–324.)

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In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "criminal street gang" or "pattern of criminal gang activity."

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Gang Evidence*.

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 [16 Cal.Rptr.3d 880, 94 P.3d 1080].)

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

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AUTHORITY

- Elements. Pen. Code, § 186.22(b)(1).
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required. *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined. *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03 (Matthew Bender).

RELATED ISSUES

Commission On or Near School Grounds

In imposing a sentence under Penal Code section 186.22(b)(1), it is a circumstance in aggravation if the defendant's underlying felony was committed on or within 1,000 feet of specified schools. (Pen. Code, § 186.22(b)(2).)

Enhancements for Multiple Gang Crimes

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

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Wobblers

Specific punishments apply to any person convicted of an offense punishable as a felony or a misdemeanor that is committed for the benefit of a criminal street gang and with the intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22(d); see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 [135 Cal.Rptr.2d 30, 69 P.3d 951].) However, the felony enhancement provided by Penal Code section 186.22(b)(1) cannot be applied to a misdemeanor offense made a felony pursuant to section 186.22(d). (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1449 [118 Cal.Rptr.2d 380].)

Murder—Enhancements Under Penal Code section 186.22(b)(1) Do Not Apply

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes "punishable by imprisonment in the state prison for life . . ." (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the ten-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang does not apply to the crime of murder.

See also the Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

(Revised August 2006)

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1402. Gang-Related Firearm Enhancement

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>] and you find that the defendant committed (that/those) crime[s] for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals (personally used/personally and intentionally discharged) a firearm during that crime [and caused (great bodily injury/ [or] death)]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the crime(./;)

[AND]

[2. That person intended to discharge the firearm(./;)]

[AND

3. That person's act caused (great bodily injury to/ [or] the death of) another person [who was not an accomplice to the crime].]

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

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[A principal *personally uses* a firearm if he or she intentionally does any of the following:

1. Displays the firearm in a menacing manner.

2. Hits someone with the firearm.

OR

3. Fires the firearm.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>

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The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In order for the defendant to receive an enhancement under Penal Code section 12022.53(e), the jury must find both that the defendant committed a felony for the benefit of a street gang and that a principal used or intentionally discharged a firearm in the offense. Thus, the court **must give** CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*, with this instruction and the jury must find both allegations have been proved before the enhancement may be applied.

In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, or intentionally discharged the firearm causing great bodily injury or death. The court should review CALCRIM Nos. 3146, 3148, and 3149 for guidance. Give the bracketed definition of "personally used" only if the prosecution specifically alleges that the principal "personally used" the firearm. Do not give the bracketed definition of "personally used" if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes . . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

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If the case involves an issue of whether the principal used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined-Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If, in the elements, the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

AUTHORITY

- Enhancement. Pen. Code, § 12022.53(e).
- Vicarious Liability Under Subdivision (e). *People v. Garcia* (2002) 28 Cal.4th 1166, 1171 [124 Cal.Rptr.2d 464, 52 P.3d 648]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12 [104 Cal.Rptr.2d 247].
- Principal Defined. Pen. Code, § 31.
- Firearm Defined. Pen. Code, § 12001(b).
- Personally Uses. *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(3).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Proximate Cause. *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 322.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03[4] (Matthew Bender).

RELATED ISSUES

Principal Need Not Be Convicted

It is not necessary that the principal who actually used or discharged the firearm be convicted. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176 [124 Cal.Rptr.2d 464, 52 P.3d 648].)

Defendant Need Not Know Principal Armed

For an enhancement charged under Penal Code section 12022.53(e) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal intended to use or discharge a firearm. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 14–15 [104 Cal.Rptr.2d 247].)

See the Related Issues sections of CALCRIM Nos. 3146–3149.

(New January 2006)

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1403. Limited Purpose of Evidence of Gang Activity

You may consider evidence of gang activity only for the limited purpose of deciding whether:

- **[The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related (crime[s]/ [and] enhancement[s]/ [and] special circumstance allegations) charged(;/.)]**

[OR]

- **[The defendant had a motive to commit the crime[s] charged(;/.)]**

[OR]

- **[The defendant actually believed in the need to defend (himself/herself)(;/.)]**

[OR]

- **[The defendant acted in the heat of passion(;/.)]**

[OR]

- **[_____ <*insert other reason court admitted gang evidence*>.]**

[You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.]

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that (he/she) has a disposition to commit crime.

BENCH NOTES

Instructional Duty

On request, the court must give a limiting instruction when evidence of gang activity has been admitted. (*People v. Hernandez* (2004) 33 Cal.4th

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1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) There is, however, no sua sponte duty to instruct the jury on this issue.

AUTHORITY

- Instruction Must Be Given on Request. *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03[2] (Matthew Bender).

(New January 2006)

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ARSON

A. ARSON

(i) Aggravated

1500. Aggravated Arson
1501. Arson: Great Bodily Injury
1502. Arson: Inhabited Structure
1503–1514. Reserved for Future Use

(ii) Simple Arson

1515. Arson
1516–1519. Reserved for Future Use

(iii) Attempted Arson

1520. Attempted Arson
1521–1529. Reserved for Future Use

B. UNLAWFULLY CAUSING A FIRE

1530. Unlawfully Causing a Fire: Great Bodily Injury
1531. Unlawfully Causing a Fire: Inhabited Structure
1532. Unlawfully Causing a Fire
1533–1549. Reserved for Future Use

C. OTHER RELATED INSTRUCTIONS

1550. Possession of Incendiary Device
1551. Arson Enhancements
1552–1599. Reserved for Future Use

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A. ARSON

(i) Aggravated

1500. Aggravated Arson

If you find the defendant guilty of arson [as charged in Count[s] ____], you must then decide whether[, for each crime of arson,] the People have proved the additional allegation that the arson was aggravated. [You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

To prove this allegation, the People must prove that:

1. **The defendant acted willfully, maliciously, deliberately, and with premeditation;**

[AND]

2. **The defendant acted with intent to injure one or more persons, or to damage property under circumstances likely to injure one or more persons, or to damage one or more structures or inhabited dwellings(;/.)**

[AND

<Alternative 3A—loss exceeding 5.65 million dollars>

[3A. The fire caused property damage and other losses exceeding 5,650,000 million dollars[, including the cost of fire suppression].]

[OR]

<Alternative 3B—destroyed 5 or more inhabited structures>

[3B. The fire damaged or destroyed five or more inhabited structures.]]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

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The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to commit the arson. The defendant acted with *premeditation* if (he/she) decided to commit the arson before committing the act that caused the arson.

[The length of time the person spends considering whether to commit arson does not alone determine whether the arson is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to commit arson made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to commit arson can be reached quickly. The test is the extent of the reflection, not the length of time.]

[A (dwelling/ [or] structure) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (dwelling/ [or] structure) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (dwelling/ [or] structure) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *dwelling* includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing factor if the defendant is charged with aggravated arson.

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If the prosecution alleges that the fire caused more than 5.65 million dollars in damage, give alternative A in element 3. If the prosecution alleges that the fire damaged five or more inhabited structures, give alternative B in element 3.

If the prosecution alleges that the defendant was previously convicted of arson within ten years of the current offense, give elements 1 and 2 only. The court must also give either CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

The definitions of "deliberation" and "premeditation" and the bracketed paragraph that begins with "The length of time" are derived from the first degree murder instruction because no recorded case construes their meaning in the context of Penal Code section 451.5. (See CALCRIM No. 521, *Murder: Degrees*.)

Give the bracketed definitions of inhabited dwelling or structure if relevant.

If there is an issue as to whether the fire *caused* the property damage, give CALCRIM No. 240, *Causation*.

AUTHORITY

- Elements. Pen. Code, § 451.5.
- Inhabitation Defined. Pen. Code, § 459.
- House Not Inhabited Means Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 239.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1515, *Arson*.

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1501. Arson: Great Bodily Injury

The defendant is charged [in Count ____] with arson that caused great bodily injury.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**
2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire caused great bodily injury to another person.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[A *structure* is any (building/bridge/tunnel/power plant/ commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the prosecution's theory is that the defendant did not set the fire but "counseled," "helped," or "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272 Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451.
- Great Bodily Injury. Pen. Code, § 12022.7(f).
- Structure, Forest Land, and Maliciously Defined. Pen. Code, § 450.
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Arson. Pen. Code, § 451.
- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included

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offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1515, *Arson*.

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1502. Arson: Inhabited Structure

The defendant is charged [in Count ____] with arson that burned an inhabited structure.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**
2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire burned an inhabited structure.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent.)

A structure is *inhabited* if someone lives there and either is present or has left but intends to return.

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the prosecution's theory is that the defendant did not set the fire but "counseled," "helped," or "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272 Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451(b).
- Inhabited Defined. Pen. Code, § 450; *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].
- Structure, Forest Land, and Maliciously Defined. Pen. Code, § 450.
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 238–242.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Arson. Pen. Code, § 451.
- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its

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holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Inhabited-Apartment

Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–379 [194 Cal.Rptr. 128].)

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(ii) Simple Arson

1515. Arson

The defendant is charged [in Count ____] with arson.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**

AND

2. **(He/She) acted willfully and maliciously.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

[A *structure* is any (building/bridge/tunnel/power plant/ commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the prosecution's theory is that the defendant did not set the fire but "counseled," "helped," or "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272 Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Related Instructions

If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see CALCRIM No. 1501, *Arson: Great Bodily Injury* and CALCRIM No. 1502, *Arson: Inhabited Structure*.

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451.
- Structure, Forest Land, and Maliciously Defined. Pen. Code, § 450; see *People v. Labaer* (2001) 88 Cal.App.4th 289, 293–294 [105 Cal.Rptr.2d 629] ["structure" does not require finished or completed building].
- General Intent Crime. *People v. Atkins* (2001) 25 Cal.4th 76, 83–84, 86 [104 Cal.Rptr.2d 738, 18 P.3d 660] [evidence of voluntary intoxication not admissible to negate mental state].
- Property Defined. *In re L.T.* (2002) 103 Cal.App.4th 262, 264–265 [126 Cal.Rptr.2d 778].
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Fixtures

Fire damage to fixtures within a building may satisfy the burning requirement if the fixtures are an integral part of the structure. (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 167–168 [270 Cal.Rptr. 389]; *People v. Lee* (1994) 24 Cal.App.4th 1773, 1778 [30 Cal.Rptr.2d 224] [whether wall-to-wall carpeting is a fixture is question of fact for jury].)

Property: Clothing

Arson includes burning a victim's clothing. (*People v. Reese* (1986) 182 Cal.App.3d 737, 739–740 [227 Cal.Rptr. 526].)

Property: Trash

Burning trash that does not belong to the defendant is arson. There is no requirement for arson that the property belong to anyone. (*In re L.T.* (2002) 103 Cal.App.4th 262, 264 [126 Cal.Rptr.2d 778].)

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(iii) Attempted Arson

1520. Attempted Arson

The defendant is charged [in Count ____] with the crime of attempted arson.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant attempted to set fire to or burn [or counseled, helped, or caused the attempted burning of] (a structure/forest land/property);**

AND

2. **(He/She) acted willfully and maliciously.**

A person *attempts to set fire to or burn* (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* is any brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427–1428 [37 Cal.Rptr.2d 401] [defendant was convicted under §§ 451 and 664; the higher sentence was reversed because § 455 governs attempted arson].)

AUTHORITY

- Elements. Pen. Code, § 455.
- Structure, Forest Land, and Maliciously Defined. Pen. Code, § 450.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

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B. UNLAWFULLY CAUSING A FIRE

1530. Unlawfully Causing a Fire: Great Bodily Injury

The defendant is charged [in Count ____] with unlawfully causing a fire that caused great bodily injury.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to[,] [or] burned[,] [or caused the burning of] (a structure/forest land/property);**
2. **The defendant did so recklessly;**

AND

3. **The fire caused great bodily injury to another person.**

<Alternative A—Recklessness: General Definition>

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B—Recklessness: Voluntary Intoxication>

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

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[A *structure* is any (building/bridge/tunnel/power plant/ commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the prosecution's theory is that the defendant did not set the fire but "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272, Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on the point that defense counsel's objection to instruction on lesser included offense constituted invited error; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].)

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AUTHORITY

- Elements. Pen. Code, § 452.
- Great Bodily Injury. Pen. Code, § 12022.7(e).
- Structure, Forest Land Defined. Pen. Code, § 450.
- Difference Between This Crime and Arson. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810].
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Unlawfully Causing a Fire. Pen. Code, § 452.

RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1515, *Arson* and CALCRIM No. 1532, *Unlawfully Causing a Fire*.

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1531. Unlawfully Causing a Fire: Inhabited Structure

The defendant is charged [in Count ____] with unlawfully causing a fire that burned an inhabited structure.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to[,] [or] burned[,] [or caused the burning of] (a structure/forest land/property);**
2. **The defendant did so recklessly;**

AND

3. **The fire burned an inhabited structure.**

<Alternative A—Recklessness: General Definition>

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B—Recklessness: Voluntary Intoxication>

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

A *structure* is a (building/bridge/tunnel/power plant/commercial or public tent).

A structure is *inhabited* if someone lives there and either (a) is present or (b) has left but intends to return.

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

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[*Property* means personal property or land other than forest land.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the prosecution's theory is that the defendant did not set the fire but rather "aided, counseled or procured" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272 Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on the point that defense counsel's objection to instruction on lesser included offense constituted invited error]; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 916].)

AUTHORITY

- Elements. Pen. Code, § 452.
- Inhabited Defined. Pen. Code, § 450; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 838, 848 [193 Cal.Rptr. 54]; *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].

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- Structure, Forest Land Defined. Pen. Code, § 450.
- Difference Between This Crime and Arson. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810].
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Unlawfully Causing a Fire. Pen. Code, § 452.

RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1515, *Arson* and CALCRIM No. 1532, *Unlawfully Causing a Fire*.

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1532. Unlawfully Causing a Fire

The defendant is charged [in Count ____] with unlawfully causing a fire.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to[,] [or] burned[,] [or caused the burning of] (a structure/forest land/property);**

AND

2. **The defendant did so recklessly.**

<Alternative A—Recklessness: General Definition>

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

<Alternative B—Recklessness: Voluntary Intoxication>

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the person willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

[A *structure* is any (building/bridge/tunnel/power plant/ commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts

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with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the prosecution's theory is that the defendant did not set the fire but "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272 Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [27 Cal.Rptr.2d 569, 906 P.2d 531] on the point that defense counsel's objection to instruction on lesser included offense constituted invited error; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].)

Related Instructions

If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see CALCRIM No. 1530, *Unlawfully Causing a Fire: Great Bodily Injury*, and CALCRIM No. 1531, *Unlawfully Causing a Fire: Inhabited Structure*.

AUTHORITY

- Elements. Pen. Code, § 452.
- Structure, Forest Land Defined. Pen. Code, § 450.

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- Difference Between This Crime and Arson. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810].
- To Burn Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1515, *Arson*.

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C. OTHER RELATED INSTRUCTIONS

1550. Possession of Incendiary Device

The defendant is charged [in Count ____] with possessing an incendiary device or flammable material.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/made/manufactured/disposed of) flammable or combustible material or an incendiary device in an arrangement or preparation;**

AND

2. **The defendant willfully and maliciously intended to use the material or device to set fire to or burn (a structure/ forest land/property).**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

***Incendiary device* means a device constructed or designed to start an incendiary fire by instant, remote or delayed means. [It is not a device commercially manufactured primarily for illumination.]**

***Incendiary fire* means a fire deliberately ignited under circumstances in which a person knows that the fire should not be ignited.**

[*Dispose of* means to give, give away, offer, offer for sale, sell, transfer, or loan.]

[A *structure* means any (building/bridge/tunnel/power plant/ commercial or public tent).]

[*Forest land* means any brush-covered land, cut-over land, forest, grasslands, or woods.]

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[*Property* means personal property or land other than forest land.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 453.
- Structure and Forest Land Defined. Pen. Code, § 450.
- Manufacture Defined. *People v. Combs* (1985) 165 Cal.App.3d 422, 427 [211 Cal.Rptr. 617].
- Includes Intent to Damage Own Property. *People v. Morse* (2004) 116 Cal.App.4th 1160, 1166 [11 Cal.Rptr.3d 9].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

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1551. Arson Enhancements

If you find the defendant guilty of arson [as charged in Count[s] ____], you must then decide whether[, for each crime of arson,] the People have proved (the additional allegation that/one or more of the following additional allegations):

<Alternative A—monetary gain>

- **[The defendant intended to obtain monetary gain when (he/she) committed the arson.]**

<Alternative B—injury to firefighter, peace officer, or EMT>

- **[(A/An) (firefighter[,]/ peace officer[,]/ [or] emergency worker) suffered great bodily injury as a result of the arson.]**

<Alternative C—great bodily injury to more than one person>

- **[The defendant caused great bodily injury to more than one person during the commission of the arson.]**

<Alternative D—multiple structures burned>

- **[The defendant caused multiple structures to burn during the commission of the arson.]**

<Alternative E—device designed to accelerate fire>

- **[The arson (caused great bodily injury[,]/ [or] caused an inhabited structure or inhabited property to burn[,]/ [or] burned a structure or forest land), and was caused by use of a device designed to accelerate the fire or delay ignition.]**

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.]

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[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

[An emergency worker includes an emergency medical technician. An *emergency medical technician* is someone who holds a valid certificate under the Health and Safety Code as an emergency medical technician.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A (structure/ [or] property) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (structure/ [or] property) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (structure/ [or] property) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *device designed to accelerate the fire* means a piece of equipment or a mechanism intended, or devised, to hasten or increase the fire's progress.]

[In order to prove that the defendant *caused* (great bodily injury to more than one person/ [or] more than one structure to burn), the People must prove that:

1. **A reasonable person in the defendant's position would have foreseen that committing arson could begin a chain of events likely to result in (great bodily injury to more than one person/ [or] the burning of more than one structure);**
2. **The commission of arson was a direct and substantial factor in causing (great bodily injury to more than one person/ [or] the burning of more than one structure);**

AND

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3. The (great bodily injury to more than one person/ [or the] burning of more than one structure) would not have happened if the defendant had not committed arson.]

[You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

The People have the burden of proving (this/each) allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing enhancement.

The reference to "arson" in the first paragraph refers to all crimes charged under Penal Code section 451, including arson of a structure, forest land, or property (see CALCRIM No. 1515), arson causing great bodily injury (see CALCRIM No. 1501), and arson of an inhabited structure (see CALCRIM No. 1502). It does not refer to aggravated arson under Penal Code section 451.5 (see CALCRIM No. 1500).

Give one of the bracketed alternatives, A–E, depending on the enhancement alleged.

If the defendant is charged with a qualifying prior conviction under Penal Code section 451.1(a)(1), give either CALCRIM No. 3100, *Prior Conviction*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

Give all relevant bracketed definitions, based on the enhancement alleged.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace

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officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

Give the bracketed paragraph that begins with "In order to prove that the defendant *caused*" if the prosecution alleges that the defendant caused great bodily injury to multiple people or caused multiple structures to burn. (Pen. Code, § 451.1(a)(5); see Pen. Code, § 451(a)–(c).)

Give the bracketed sentence that begins with "You must decide whether the People have proved" if the same enhancement is alleged for multiple counts of arson.

AUTHORITY

- Elements. Pen. Code, §§ 451.1, 456(b).
- Device Designed to Accelerate Fire Defined. *People v. Andrade* (2000) 85 Cal.App.4th 579, 587 [102 Cal.Rptr.2d 254].
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Firefighter Defined. Pen. Code, § 245.1.
- Emergency Medical Technician Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Duty to Define Proximate Cause. See *People v. Bland* (2002) 28 Cal.4th 313, 334–335 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [in context of firearm enhancement].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 307.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[3] (Matthew Bender).

RELATED ISSUES

Discretion to Strike Enhancement

The trial court retains discretion under Penal Code section 1385 to strike an arson sentence enhancement. (*People v. Wilson* (2002) 95 Cal.App.4th

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198, 203 [115 Cal.Rptr.2d 355] [enhancement for use of an accelerant under Pen. Code, § 451.1(a)(5)].)

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ROBBERY AND CARJACKING

A. ROBBERY

1600. Robbery
1601. Robbery in Concert
1602. Robbery: Degrees
1603. Robbery: Intent of Aider and Abettor
1604–1649. Reserved for Future Use

B. CARJACKING

1650. Carjacking
1651–1699. Reserved for Future Use

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A. ROBBERY

1600. Robbery

The defendant is charged [in Count ____] with robbery.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took property that was not (his/her) own;**
2. **The property was taken from another person's possession and immediate presence;**
3. **The property was taken against that person's will;**
4. **The defendant used force or fear to take the property or to prevent the person from resisting;**

AND

5. **When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[A (store/ [or] business) (employee/_____ <*insert description*>) may be robbed if property of the (store/ [or] business) is taken,

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even though he or she does not own the property and was not, at that moment, in immediate physical control of the property. If the facts show that the (employee/_____ <*insert description*>) was a representative of the owner of the property and the (employee/_____ <*insert description*>) expressly or implicitly had authority over the property, then that (employee/_____ <*insert description*>) may be robbed if property of the (store/ [or] business) is taken by force or fear.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

Give the bracketed definition of "against a person's will" on request.

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If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*.

AUTHORITY

- Elements. Pen. Code, § 211.
- Fear Defined. Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 609 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Robbery of Store Employee or Contractor. *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115–1117 [131 Cal.Rptr.2d 319]; *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521–522 [3 Cal.Rptr.3d 835].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes—Property, § 86.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

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COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 22].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

- Attempted Robbery. Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft. Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].

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- Grand Theft Automobile. Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

RELATED ISSUES

Asportation—Felonious Taking

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

Claim of Right

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies where a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tunfunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

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Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

Force—Amount

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that the force employed by a pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.2d 262, 92 P.2d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

Force—When Applied

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is a distance away from property taken].) Property has also been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

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Multiple Victims

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

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1601. Robbery in Concert

The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count ____] with robbery by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>].

To prove that a defendant is guilty of this crime, the People must prove that:

1. **The defendant personally committed or aided and abetted a robbery;**
2. **When (he/ [or] she) did so, the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery;**

AND

3. **The robbery was committed in an inhabited (dwelling/ vessel/floating home/trailer coach/part of a building).**

A (dwelling/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone lives there and either is present or has left but intends to return.

[A *dwelling* includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it.]

To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed robbery, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted robbery, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved robbery in concert.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ROBBERY AND AIDING AND ABETTING ARE GIVEN.>

[To prove the crime of robbery in concert, the People do not have to prove a prearranged plan or scheme to commit robbery.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court **must** also give CALCRIM No. 1600, *Robbery*, and all necessary instructions on aiding and abetting (see CALCRIM Nos. 400–404).

If supported by the evidence, give on request the final bracketed paragraph regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

AUTHORITY

- Elements. Pen. Code, § 213(a)(1)(A).
- Acting in Concert. *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658] [in context of sodomy in concert].
- Inhabited. See Pen. Code, § 459; *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1188 [8 Cal.Rptr.2d 239].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10[3] (Matthew Bender).

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1602. Robbery: Degrees

Robbery is divided into two degrees. If you conclude that the defendant committed a robbery, you must then decide the degree.

To prove that the defendant is guilty of first degree robbery, the People must prove that:

[The robbery was committed in an inhabited (dwelling/vessel/ floating home/trailer coach/part of a building). A (dwelling/vessel/ floating home/trailer coach/part of a building) is inhabited if someone lives there and either is present or has left but intends to return.]

[The robbery was committed while the person robbed was using or had just used an ATM machine and was still near the machine.]

[The robbery was committed while the person robbed was performing (his/her) duties as the driver of or was a passenger on (a/an) (bus/taxi/cable car/streetcar/trackless trolley/_____ <*other kind of vehicle used to transport people*>.]

All other robberies are of the second degree.

The People have the burden of proving beyond a reasonable doubt that the robbery was first degree rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree robbery.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if first degree robbery has been charged, or if the prosecution is seeking a first degree conviction based on the facts. Give one of the three bracketed paragraphs defining the elements of first degree robbery.

AUTHORITY

- Determination of Degrees. Pen. Code, § 212.5.

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- Floating Home Defined. Health & Saf. Code, § 18075.55(d).
- Trailer Coach Defined. Veh. Code, § 635; Health & Saf. Code, § 18009.3.
- Vessel Defined. Harb. & Nav. Code, § 21.
- Inhabitation. *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1188 [8 Cal.Rptr.2d 239].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes—Property, § 88.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10[1][a][i], [3] (Matthew Bender).

RELATED ISSUES

Hotel Room

A hotel room is an "inhabited dwelling house" for purposes of first degree robbery. (*People v. Fleetwood* (1985) 171 Cal.App.3d 982, 987–988 [217 Cal.Rptr. 612].)

Robbery in One's Own Residence

A robbery committed in one's own residence is still first degree robbery. (Pen. Code, § 212.5; *People v. Alvarado* (1990) 224 Cal.App.3d 1165, 1169 [274 Cal.Rptr. 452] [defendant robbed two salesmen after bringing them back to his hotel room]; *People v. McCullough* (1992) 9 Cal.App.4th 1298, 1300 [12 Cal.Rptr.2d 341].)

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1603. Robbery: Intent of Aider and Abettor

To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety.

A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the defendant is charged with aiding and abetting a robbery and an issue exists about when the defendant allegedly formed the intent to aid and abet. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165–1166 [282 Cal.Rptr. 450, 811 P.2d 742] [defendant who drove get-away car asserted he did not intend to aid an abet at time of robbery].)

This instruction **must** be given with CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

Do not give this instruction if the defendant is charged with felony murder.

Do not give CALCRIM No. 3261, *During Commission of Felony: Defined-Escape Rule* as a substitute for this instruction.

AUTHORITY

- Aider and Abettor to Robbery—When Intent Formed. *People v. Cooper* (1991) 53 Cal.3d 1158, 1165–1166 [282 Cal.Rptr. 450, 811 P.2d 742].
- Place of Temporary Safety. *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].

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Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10, Ch. 142, *Crimes Against the Person*, § 142.10[1][b], [e] (Matthew Bender).

RELATED ISSUES

Place of Temporary Safety Based on Objective Standard

Whether the defendant had reached a place of temporary safety is judged on an objective standard. The "issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].)

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B. CARJACKING

1650. Carjacking

The defendant is charged [in Count ____] with carjacking.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took a motor vehicle that was not (his/her) own;**
2. **The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger;**
3. **The vehicle was taken against that person's will;**
4. **The defendant used force or fear to take the vehicle or to prevent that person from resisting;**

AND

5. **When the defendant used force or fear to take the vehicle, (he/she) intended to deprive the other person of possession of the vehicle either temporarily or permanently.**

The defendant's intent to take the vehicle must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit carjacking.

A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[A vehicle is within a person's *immediate presence* if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [414 P.2d 366, 51 Cal.Rptr. 238] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary to CALCRIM No. 1600, *Robbery*.

Give the bracketed definition of "against a person's will" on request.

AUTHORITY

- Elements. Pen. Code, § 215.
- Fear Defined. Pen. Code, § 212.
- Immediate Presence Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Medina* (1995) 39 Cal.App.4th 643, 650 [45 Cal.Rptr.2d 112].
- Possession Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143–1144 [47 Cal.Rptr.2d 343].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes—Person, § 276.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10[2][b], 142.10A (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Carjacking. Pen. Code, §§ 663, 215; see *People v. Jones* (1999) 75 Cal.App.4th 616, 628 [89 Cal.Rptr.2d 485].

Neither theft or robbery is a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48] [theft]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419 [45 Cal.Rptr.2d 153] [robbery].) Vehicle theft (Veh. Code, § 10851(a)) is not a lesser included offense of carjacking. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].)

RELATED ISSUES

Force—Timing

Force or fear must be used against the victim to gain possession of the vehicle. The timing, however, "in no way depends on whether the confrontation and use of force or fear occurs before, while, or after the defendant initially takes possession of the vehicle." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133 [66 Cal.Rptr.2d 72].)

Asportation—Felonious Taking

"Felonious taking" has the same meaning in carjacking as in robbery. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1062 [6 Cal.Rptr.3d 432, 79 P.3d 548].) To satisfy the asportation requirement for robbery, no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim. [S]light movement is enough to satisfy the asportation requirement. (*Id.* at p. 1061 [internal quotation marks and citations omitted].) The taking can occur whether or not the victim remains with the car. (*People v. Duran* (2001) 88 Cal.App.4th 1371, 1375–1377 [106 Cal.Rptr.2d 812].) Carjacking can also occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [although victim was not physically present in the parking lot when defendant drove the car away, she had been forced to relinquish her car keys].)

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BURGLARY AND RECEIVING STOLEN PROPERTY

A. BURGLARY

1700. Burglary

1701. Burglary: Degrees

1702. Burglary: Intent of Aider and Abettor

1703–1749. Reserved for Future Use

B. RECEIVING STOLEN PROPERTY AND RELATED INSTRUCTIONS

1750. Receiving Stolen Property

1751. Defense to Receiving Stolen Property: Innocent Intent

1752. Owning or Operating a Chop Shop

1753–1799. Reserved for Future Use

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A. BURGLARY

1700. Burglary

The defendant is charged [in Count ____] with burglary.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant entered (a/an) (building/room within a building/locked vehicle/_____ <*insert other statutory target*>);**

AND

2. **When (he/she) entered (a/an) (building/room within the building/locked vehicle/_____ <*insert other statutory target*>), (he/she) intended to commit (theft/ [or] _____ <*insert one or more felonies*>).**

To decide whether the defendant intended to commit (theft/ [or] _____ <*insert one or more felonies*>), please refer to the separate instructions that I (will give/have given) you on (that/ those) crime[s].

A burglary was committed if the defendant entered with the intent to commit (theft/ [or] _____ <*insert one or more felonies*>). The defendant does not need to have actually committed (theft/ [or] _____ <*insert one or more felonies*>) as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or] _____ <*insert one or more felonies*>).]

[Under the law of burglary, a person *enters a building* if some part of his or her body [or some object under his or her control] penetrates the area inside the building's outer boundary.]

[A building's outer boundary includes the area inside a window screen.]

[The People allege that the defendant intended to commit (theft/ [or] _____ <*insert one or more felonies*>). You may not find

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the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes (he/she) intended.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903]), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony and has a **sua sponte** duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].) Give all appropriate instructions on theft or the felony alleged.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blanks in elements 1 and 2. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55(d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

On request, give the bracketed paragraph that begins with "Under the law of burglary," if there is evidence that only a portion of the defendant's body, or an instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7–8 [120 Cal.Rptr.2d 131, 46 P.3d 920]; *People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

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On request, give the bracketed sentence defining "outer boundary" if there is evidence that the outer boundary of a building for purposes of burglary was a window screen. (See *People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].)

If multiple underlying felonies are charged, give the bracketed paragraph that begins with "The People allege that the defendant intended to commit either." (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

If the defendant is charged with first degree burglary, give CALCRIM No. 1701, *Burglary: Degrees*.

AUTHORITY

- Elements. Pen. Code, § 459.
- Instructional Requirements. *People v. Failla* (1966) 64 Cal.2d 560, 564, 568–569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711 [144 Cal.Rptr. 330]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 113, 115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Burglary. Pen. Code, §§ 663, 459.
- Tampering With a Vehicle. Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–507 [193 Cal.Rptr. 381] [if burglary of automobile charged].

RELATED ISSUES

Auto Burglary—Entry of Locked Vehicle

Under Penal Code section 459, forced entry of a locked vehicle constitutes burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863 [57 Cal.Rptr.2d 12].) However, there must be evidence of forced entry. (See

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People v. Woods (1980) 112 Cal.App.3d 226, 228–231 [169 Cal.Rptr. 179] [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [pushing open broken wing lock on window, reaching one's arm inside vehicle, and unlocking car door evidence of forced entry].) Opening an unlocked passenger door and lifting a trunk latch to gain access to the trunk is not an auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 917–918 [103 Cal.Rptr.2d 626].)

Auto Burglary—Definition of Locked

To lock, for purposes of auto burglary, is "to make fast by interlinking or interlacing of parts . . . [such that] some force [is] required to break the seal to permit entry . . . ." (*In re Lamont R.* (1988) 200 Cal.App.3d 244, 247 [245 Cal.Rptr. 870], quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [51 Cal.Rptr. 18] [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

Auto Burglary—Intent to Steal

Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461 [25 Cal.Rptr.2d 296]; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [98 Cal.Rptr. 231] [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 864 [57 Cal.Rptr.2d 12] [stealing headlamps, windshield wipers, or hubcaps are thefts, or attempted thefts, auto tampering, or acts of vandalism, not burglaries].)

Building

A building has been defined for purposes of burglary as "any structure which has walls on all sides and is covered by a roof." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed "building" broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133

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Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the definition of building is not without limits and courts have focused on "whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672] [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company's "gang box," a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

Outer Boundary

A building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Under this test, a window screen is part of the outer boundary of a building for purposes of burglary. (*People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].) Whether penetration into an area behind a window screen amounts to an entry of a building within the meaning of the burglary statute is a question of law. The instructions must resolve such a legal issue for the jury. (*Id.* at p. 16.)

Theft

Any one of the different theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [219 Cal.Rptr. 707] [entry into building to use person's telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31 [46 Cal.Rptr.2d 840].)

Burglarizing One's Own Home—Possessory Interest

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent's home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People*

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v. Sears (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

Consent

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent of the invitee. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860].) A person who enters for a felonious purpose, however, may be found guilty of burglary even if he or she enters with the owner's or occupant's consent. (*People v. Frye* (1998) 18 Cal.4th 894, 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].) A joint property owner/occupant cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420–423 [76 Cal.Rptr.2d 536] [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].)

Entry by Instrument

When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083] [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, 643–644 [243 Cal.Rptr. 827] [insertion of ATM card into machine was burglary].)

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Multiple Convictions

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: " '[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.' " (*In re William S., supra,* 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." The court gave this example: where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." (*Ibid.*) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison, supra,* 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison*, the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (*People v. Washington, supra*, 50 Cal.App.4th at pp. 574–579; see also 2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) "Multiple Entries," § 662A, p. 38.) The court further stated that any "concern about absurd results are [sic] better resolved under [Penal Code] section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting] a rule that, in effect, creates the new crime of continuous burglary." (*People v. Washington, supra,* 50 Cal.App.4th at p. 578.)

Room

Penal Code section 459 includes "room" as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the

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building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–1258 [263 Cal.Rptr. 183] [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate "room" for which a defendant can be convicted on separate counts of burglary. (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521 [271 Cal.Rptr. 769] [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [264 Cal.Rptr. 49] [separate business offices in same building].)

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] ["the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning"]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

Temporal or Physical Proximity-Intent to Commit the Felony

According to some cases, a burglary occurs "if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction." (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

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However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236 [75 Cal.Rptr.2d 40], the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the target crime in the same building or on the same occasion as the entry. (*People v. Kwok, supra,* 63 Cal.App.4th at pp. 1246–1248 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that "the 'continuous transaction test' and the 'immediate vicinity test' . . . are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*." (*Id.* at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court "purported to rely on the 'continuous transaction' factor of *Wright*, [the decision] rested principally on the 'facilitation' factor." (*Id.* at pp. 1247–1248.) While *Kwok* and *Ortega* dispensed with the elemental requirements of spatial and temporal proximity, they did so only where the subject entry is "closely connected" with, and is made in order to facilitate, the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749 [109 Cal.Rptr.2d 273].)

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1701. Burglary: Degrees

Burglary is divided into two degrees. If you conclude that the defendant committed a burglary, you must then decide the degree.

First degree burglary is the burglary of an inhabited (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building).

A (house/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry.

[A (house/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (house/vessel/floating home/trailer coach/part of a building) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *house* includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it.]

[A *vessel* includes ships of all kinds, steamboats, steamships, canal boats, barges, sailing vessels, and any structure intended to transport people or merchandise over water.]

[A *floating home* is a floating structure that:

(1) is intended to be used as a stationary waterborne residence;

(2) does not have its own mode of power;

(3) is dependent on a continuous utility link originating on shore;

AND

(4) has a permanent continuous hookup to a sewage system on shore.]

[A *trailer coach* is a vehicle without its own mode of power, designed to be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

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[A *trailer coach* is also a park trailer that is intended for human habitation for recreational or seasonal use only and:

(1) has a floor area of no more than 400 square feet;

(2) is not more than 14 feet wide;

(3) is built on a single chassis;

AND

(4) may only be transported on public highways with a permit.]

All other burglaries are second degree.

The People have the burden of proving beyond a reasonable doubt that the burglary was first degree burglary. If the People have not met this burden, you must find the defendant not guilty of first degree burglary.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if there is evidence supporting first degree burglary.

AUTHORITY

- Determination of Degrees. Pen. Code, § 460.
- Floating Home Defined. Health & Saf. Code, § 18075.55(d).
- Inhabitation Defined. Pen. Code, § 459.
- Trailer Coach Defined. Veh. Code, § 635; Health & Saf. Code, § 18009.3.
- Vessel Defined. Harb. & Nav. Code, § 21.
- Room Within Inhabited House. *People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289].
- House Not Inhabited if Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 113–115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10, Ch. 143, *Crimes Against Property*, § 143.10[1][b], [d] (Matthew Bender).

RELATED ISSUES

Dwelling Houses for Purposes of First Degree Burglary

A "house" has been broadly defined as "any structure which has walls on all sides and is covered by a roof." (*People v. Wilson* (1992) 11 Cal.App.4th 1483, 1487–1489 [15 Cal.Rptr.2d 77], citing *People v. Buyle* (1937) 22 Cal.App.2d 143, 148 [70 P.2d 955].) In determining whether a structure is part of an inhabited dwelling, the essential inquiry is whether the structure is "functionally interconnected with and immediately contiguous to other portions of the house." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1404 [48 Cal.Rptr.2d 256], disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559 [66 Cal.Rptr.2d 423, 941 P.2d 56]; *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107, 1113 [92 Cal.Rptr.2d 236].) The following structures have each been held to be a dwelling house or part of a dwelling house for purposes of first degree burglary:

a. A hospital room to which a patient was assigned overnight. (*People v. Fond* (1999) 71 Cal.App.4th 127, 131–132 [83 Cal.Rptr.2d 660].)

b. An occupied hotel room. (*People v. Fleetwood* (1985) 171 Cal.App.3d 982, 988 [217 Cal.Rptr. 612].)

c. A tent. (*Wilson, supra,* 11 Cal.App.4th at pp. 1487–1489.)

d. A common-area laundry room located under the same roof as and contiguous to occupied apartments. (*People v. Woods* (1998) 65 Cal.App.4th 345, 348–350 [75 Cal.Rptr.2d 917].)

e. An attached garage. (*People v. Fox* (1997) 58 Cal.App.4th 1041, 1046–1047 [68 Cal.Rptr.2d 424]; *People v. Moreno* (1984) 158 Cal.App.3d 109, 112 [204 Cal.Rptr. 17].)

f. A home office sharing a common wall and roof with the living quarters. (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107–1112 [92 Cal.Rptr.2d 236].)

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g. A storeroom connected to a house by a breezeway. (*People v. Coutu* (1985) 171 Cal.App.3d 192, 193 [217 Cal.Rptr. 191].)

h. An unoccupied but occasionally used guest house. (*People v. Hines* (1989) 210 Cal.App.3d 945, 949–951 [259 Cal.Rptr. 128], disapproved of on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 862–866 [89 Cal.Rptr.2d 279, 984 P.2d 486].)

Mistake Concerning Residential Nature of Building

A reasonable but mistaken belief that a dwelling house is not inhabited is not a defense to first degree burglary. (*People v. Parker* (1985) 175 Cal.App.3d 818, 821–824 [223 Cal.Rptr. 284].) The Penal Code does not make knowledge that a "dwelling house" is "inhabited" an element of first degree burglary. (See Pen. Code, §§ 459, 460; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 843–848 [193 Cal.Rptr. 54].)

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1702. Burglary: Intent of Aider and Abettor

To be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary before the perpetrator finally left the structure.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the defendant is charged with aiding and abetting a burglary and there is an issue about when the defendant allegedly formed the intent to aid and abet.

This instruction **must** be given with CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

Do not give this instruction if the defendant is charged with felony murder.

AUTHORITY

- Aider and Abettor to Burglary—When Intent Formed. *People v. Montoya* (1994) 7 Cal.4th 1027, 1044–1046 [31 Cal.Rptr.2d 128, 874 P.2d 903].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10, Ch. 143, *Crimes Against Property*, § 143.10[1][b], [d] (Matthew Bender).

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B. RECEIVING STOLEN PROPERTY AND RELATED INSTRUCTIONS

1750. Receiving Stolen Property

The defendant is charged [in Count ____] with receiving stolen property.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (bought/received/sold/aided in selling/ concealed or withheld from its owner/aided in concealing or withholding from its owner) property that had been (stolen/obtained by extortion);**

[AND]

2. **When the defendant (bought/received/sold/aided in selling/ concealed or withheld/aided in concealing or withholding) the property, (he/she) knew that the property had been (stolen/obtained by extortion)(;/.)**

<Give element 3 when instructing on knowledge of presence of property; see Bench Notes>

[AND

3. **The defendant actually knew of the presence of the property.]**

[Property is *stolen* if it was obtained by any type of theft, or by burglary or robbery. [Theft includes obtaining property by larceny, embezzlement, false pretense, or trick.]]

[Property is *obtained by extortion* if: (1) the property was obtained from another person with that person's consent, and (2) that person's consent was obtained through the use of force or fear.]

[To *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough.] [Two or more people can possess the property at the same time.]

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[A person does not have to actually hold or touch something to possess it. It is enough if the person has [control over it] [or] [the right to control it], either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is also charged with a theft crime, the court has a **sua sponte** duty to instruct that the defendant may not be convicted of both theft and receiving the same stolen property. (*People v. Garza* (2005) 35 Cal.4th 866, 881–882 [28 Cal.Rptr.3d 335, 111 P.3d 310] [upholding dual convictions for receiving stolen property and a violation of Vehicle Code section 10851(a) as a nontheft conviction for post-theft driving].)

If substantial evidence exists, a specific instruction must be given on request that the defendant must have knowledge of the presence of the stolen goods. (*People v. Speaks* (1981) 120 Cal.App.3d 36, 39–40 [174 Cal.Rptr. 65]; see *People v. Gory* (1946) 28 Cal.2d 450, 455–456, 458–459 [170 P.2d 433] [possession of narcotics requires knowledge of presence]; see also discussion of voluntary intoxication in Related Issues, below.) Give bracketed element 3 when supported by the evidence.

Related Instructions

For instructions defining extortion and the different forms of theft, see series 1800, Theft and Extortion. On request, the court should give complete instruction on the elements of theft or extortion.

For an instruction about when guilt may be inferred from possession of recently stolen property, see CALCRIM No. 376, *Possession of Recently Stolen Property as Evidence of a Crime*.

AUTHORITY

- Elements. Pen. Code, § 496(a); *People v. Land* (1994) 30 Cal.App.4th 220, 223 [35 Cal.Rptr.2d 544].
- Extortion Defined. Pen. Code, § 518.

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- Theft Defined. Pen. Code, §§ 484, 490a.
- Concealment. *Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343–344 [146 Cal.Rptr. 311].
- General Intent Required. *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [161 Cal.Rptr. 680] [general intent crime]; but see *People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39] [knowledge element is a "specific mental state"].
- Knowledge Element. *People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39].
- Possession and Control. *People v. Land* (1994) 30 Cal.App.4th 220, 223–224 [35 Cal.Rptr.2d 544]; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336 [75 Cal.Rptr. 616]; see *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [257 Cal.Rptr. 171] [constructive possession means knowingly having the right of control over the property directly or through another]; *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [238 P.2d 659] [two or more persons may jointly possess property].
- Stolen Property. *People v. Kunkin* (1973) 9 Cal.3d 245, 250 [107 Cal.Rptr. 184, 507 P.2d 1392] [theft]; see, e.g., *People v. Candiotto* (1960) 183 Cal.App.2d 348, 349 [6 Cal.Rptr. 876] [burglary]; *People v. Siegfried* (1967) 249 Cal.App.2d 489, 493 [57 Cal.Rptr. 423] [robbery].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 72–81.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, §§ 143.01[2][c], 143.03, 143.10[2][c], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Receiving Stolen Property. Pen. Code, §§ 664, 496(d); *People v. Rojas* (1961) 55 Cal.2d 252, 258 [10 Cal.Rptr. 465, 358 P.2d 921] [stolen goods recovered by police were no longer "stolen"]; *People v. Moss* (1976) 55 Cal.App.3d 179, 183 [127 Cal.Rptr. 454] [antecedent theft not a necessary element].

Theft by appropriation of lost property (Pen. Code, § 485) is not a necessarily included offense of receiving stolen property. (*In re Greg F.* (1984) 159 Cal.App.3d 466, 469 [205 Cal.Rptr. 614].)

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RELATED ISSUES

Defense of Voluntary Intoxication or Mental Disease

Though receiving stolen property is a general intent crime, one element of the offense is knowledge that the property was stolen, a specific mental state. With regard to the element of knowledge, receiving stolen property is a "specific intent crime" as that term is used in Penal Code sections 22(b) and 28(a). (*People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39].) Therefore, the defendant should have the opportunity to introduce evidence and request instructions regarding the lack of requisite knowledge. (*Id.* at p. 986; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131 [77 Cal.Rptr.2d 428, 959 P.2d 735]; but see *People v. Atkins* (2001) 25 Cal.4th 76, 96–97 [104 Cal.Rptr.2d 738, 18 P.3d 660] (conc. opn. of Brown, J.) [criticizing *Mendoza* and *Reyes* as wrongly transmuting a knowledge requirement into a specific intent].) See CALCRIM No. 3426, *Voluntary Intoxication*.

Dual Convictions Prohibited

A person may not be convicted of stealing and of receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706] superseded by statute on related grounds, as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157 [68 Cal.Rptr.2d 440]; see *People v. Tatum* (1962) 209 Cal.App.2d 179, 183 [25 Cal.Rptr. 832].) See CALCRIM No. 3516, *Multiple Counts: Alternative Charges For One Event*.

Receiving Multiple Items on Single Occasion

A defendant who receives more than one item of stolen property on a single occasion commits one offense of receiving stolen property. (See *People v. Lyons* (1958) 50 Cal.2d 245, 275 [324 P.2d 556].)

Specific Vendors

The Penal Code establishes separate crimes for specific persons buying or receiving particular types of stolen property, including the following:

1. Swap meet vendors and persons dealing in or collecting merchandise or personal property. (Pen. Code, § 496(b).)
2. Dealers or collectors of junk metals or secondhand materials who buy or receive particular metals used in providing telephone, transportation, or public utility services. (Pen. Code, § 496a(a).)

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3. Dealers or collectors of secondhand books or other literary materials. (Pen. Code, § 496b [misdemeanors].)
4. Persons buying or receiving motor vehicles, trailers, special construction equipment, or vessels. (Pen. Code, § 496d(a).)
5. Persons buying, selling, receiving, etc., specific personal property, including integrated computer chips or panels, electronic equipment, or appliances, from which serial numbers or identifying marks have been removed or altered. (Pen. Code, § 537e(a).)

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1751. Defense to Receiving Stolen Property: Innocent Intent

The defendant is not guilty of receiving (stolen/extorted) property if (he/she) intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/ received/concealed/withheld) the property.

If you have a reasonable doubt about whether the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/ concealed/withheld) the property, you must find (him/her) not guilty of receiving (stolen/extorted) property.

[This defense does not apply if the defendant decided to (return the property to its owner/ [or] deliver the property to law enforcement) only after (he/she) wrongfully (bought/received/ concealed/withheld) the property.] [The defense [also] does not apply if the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/ she) (bought/received/concealed/withheld) it, but later decided to (sell/conceal/withhold) the property.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on this defense if there is substantial evidence supporting the defense and the defendant is relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Osborne* (1978) 77 Cal.App.3d 472, 477 [143 Cal.Rptr. 582]; see *People v. Sedeno* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal. Rptr. 84, 603 P.2d 1] and in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10, 164–178 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 3 [222 Cal.Rptr. 630].)

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Related Instructions

For the general requirement of a union between an act and intent (Pen. Code, § 20), see CALCRIM No. 250, *Union of Act and Intent: General Intent*.

AUTHORITY

- Instructional Requirements. *People v. Osborne* (1978) 77 Cal.App.3d 472, 476 [143 Cal.Rptr. 582].
- Burden of Proof. *People v. Dishman* (1982) 128 Cal.App.3d 717, 721–722 [180 Cal.Rptr. 467]; *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [161 Cal.Rptr. 680].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 72.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.03[1][d], [2][a] (Matthew Bender).

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1752. Owning or Operating a Chop Shop

The defendant is charged [in Count ____] with owning or operating a chop shop.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant knew that (he/she) (owned/ [or] operated) a chop shop;**

AND

1. **The defendant intentionally (owned/ [or] operated) the chop shop.**

A *chop shop* is a building, lot, or other place where:

1. **A person alters, destroys, takes apart, reassembles, or stores a motor vehicle or motor vehicle part;**
2. **That person knows that the vehicle or part has been obtained by theft, fraud, or conspiracy to defraud;**

AND

3. **That person knows that the vehicle or part was obtained in order to either:**
   a. **Sell or dispose of the vehicle or part;**

   OR

   b. **Alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity, including an identification number, of the vehicle or part, in order to misrepresent its identity or prevent its identification.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Veh. Code, § 10801.
- Chop Shop Defined. Veh. Code, § 250.
- Meaning of "Operate." *People v. Ramirez* (2000) 79 Cal.App.4th 408, 414–415 [94 Cal.Rptr.2d 76].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 263.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.03[2][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Receiving Stolen Property. Pen. Code, § 496. There is a split in authority on this issue. *People v. Sanchez* (2003) 113 Cal.App.4th 325, 333–334 [6 Cal.Rptr.3d 271] concluded that receiving stolen property is a lesser included offense, but a defendant may be convicted of both offenses when different property is involved in the two convictions. However, *People v. Strohman* (2000) 84 Cal.App.4th 1313, 1316 [101 Cal.Rptr.2d 520], reached the opposite conclusion.

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THEFT AND EXTORTION

A. THEFT

1800. Theft by Larceny
1801. Theft: Degrees
1802. Theft: As Part of Overall Plan
1803. Theft: By Employee or Agent
1804. Theft by False Pretense
1805. Theft by Trick
1806. Theft by Embezzlement
1807. Theft From Elder or Dependent Adult
1808–1819. Reserved for Future Use

B. TAKING OR TAMPERING WITH VEHICLE

1820. Unlawful Taking or Driving of Vehicle
1821. Tampering With a Vehicle
1822. Unlawful Taking of Bicycle or Vessel
1823–1829. Reserved for Future Use

C. EXTORTION

1830. Extortion by Threat or Force
1831. Extortion by Threatening Letter
1832. Extortion of Signature
1833–1849. Reserved for Future Use

D. PETTY THEFT WITH A PRIOR

1850. Petty Theft With Prior Conviction
1851–1859. Reserved for Future Use

E. THEFT RELATED INSTRUCTIONS

1860. Owner's Opinion of Value
1861. Jury Does Not Need to Agree on Form of Theft

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1862. Return of Property Not a Defense to Theft
1863. Defense to Theft or Robbery: Claim of Right
1864–1899. Reserved for Future Use

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A. THEFT

1800. Theft by Larceny

The defendant is charged [in Count ____] with [grand/petty] theft [by larceny].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took possession of property owned by someone else;**
2. **The defendant took the property without the owner's [or owner's agent's] consent;**
3. **When the defendant took the property (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property);**

AND

4. **The defendant moved the property, even a small distance, and kept it for any period of time, however brief.**

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion

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of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 3.

Related Instructions

If the defendant is also charged with grand theft, give CALCRIM No. 1801, *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

If a different theory of theft is presented, see CALCRIM No. 1804, *Theft by False Pretense*; CALCRIM No. 1805, *Theft by Trick*; CALCRIM No. 1806, *Theft by Embezzlement*. See also CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*. The court may also wish to instruct with the bracketed "[by larceny]" in the first sentence to distinguish this theory of theft from the others.

For theft of real property, use CALCRIM No. 1804, *Theft by False Pretense*. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].)

AUTHORITY

- Elements. Pen. Code, § 484; *People v. Williams* (1946) 73 Cal.App.2d 154, 157 [166 P.2d 63]; *People v. Edwards* (1925) 72 Cal.App. 102, 112–117 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].
- Intent to Deprive Owner of Main Value. *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to extent it is inconsistent, *People v. Marquez* (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 13–16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

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COMMENTARY

Asportation

To constitute a completed theft, the property must be asported or carried away. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654 [78 Cal.Rptr.2d 177].) Asportation requires three things: (1) the goods are severed from the possession or custody of the owner, (2) the goods are in the complete possession of the thief or thieves, and (3) the property is moved, however slightly. (*Ibid.*; *People v. Edwards* (1925) 72 Cal.App. 102, 114–115 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948]; *People v. Collins* (1959) 172 Cal.App.2d 295, 299 [342 P.2d 370] [joint possession of property by more than one thief].) Asportation is fulfilled by wrongful removal of property from the owner or possessor, against his or her will with the intent to steal it, even though the property is retained by the thief but a moment. (*People v. Quiel* (1945) 68 Cal.App.2d 674, 679 [157 P.2d 446].) Paragraph 4 sets forth the asportation element.

Value

The property taken must have some intrinsic value, however slight. (*People v. Franco* (1970) 4 Cal.App.3d 535, 542 [84 Cal.Rptr. 513]; *People v. Martinez* (2002) 95 Cal.App.4th 581, 585 [115 Cal.Rptr.2d 574].) The final bracketed paragraph may be given on request if the property in question was of slight value.

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.
- Taking an Automobile Without Consent. Veh. Code, § 10851; *People v. Pater* (1968) 267 Cal.App.2d 921, 926 [73 Cal.Rptr. 823].
- Auto Tampering. Veh. Code, § 10852; *People v. Anderson* (1975) 15 Cal.3d 806, 810–811 [126 Cal.Rptr. 235, 543 P.2d 603].
- Misdemeanor Joyriding. Pen. Code, § 499b [of bicycle, motorboat, or vessel].

Petty theft is a not lesser-included offense of grand theft when the charge of grand theft is based on the type of property taken. (*People v. Thomas* (1974) 43 Cal.App.3d 862, 870 [118 Cal.Rptr. 226].)

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RELATED ISSUES

Claim of Right

If a person actually believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to theft. (*People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440]; see also *People v. Devine* (1892) 95 Cal. 227, 229 [30 P. 378] ["[i]t is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another's goods"]; *In re Bayles* (1920) 47 Cal.App. 517, 519–521 [190 P. 1034] [larceny conviction reversed where landlady actually believed she was entitled to take tenant's property for cleaning fees incurred even if her belief was unreasonable]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4–6, 10–11 [160 Cal.Rptr. 692]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.)

Community Property

A person may be found guilty of theft of community property, but only if he or she has the intent to deprive the other owner of the property permanently. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1738–1740 [60 Cal.Rptr.2d 357].)

Fraudulent Refunds

A person who takes property while in a store and presents it for a refund is guilty of theft. (*People v. Davis* (1998) 19 Cal.4th 301 [79 Cal.Rptr.2d 295, 965 P.2d 1165].) The Supreme Court held that taking with the intent to fraudulently obtain a refund constitutes both an intent to permanently deprive the store of property and a trespassory taking within the meaning of larceny. (*Id.* at pp. 317–318; see also *People v. Shannon* (1998) 66 Cal.App.4th 649 [78 Cal.Rptr.2d 177].)

Multiple or Single Conviction of Theft-Overall Plan or Scheme

If multiple items are stolen from a single victim over a period of time and the takings are part of one intent, plan, or impulse, only one theft occurs and the value of the items is aggregated when determining the degree of theft. (*People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39]; accord *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19–21 [145 Cal.Rptr. 313]; see CALCRIM No. 1802, *Theft: As Part of Overall Plan*.)

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No Need to Use or Benefit From the Property Taken

It does not matter that the person taking the property does not intend to use the property or benefit from it; he or she is guilty of theft if there is intent to permanently deprive the other person of the property. (*People v. Kunkin* (1973) 9 Cal.3d 245, 251 [107 Cal.Rptr. 184, 507 P.2d 1392]; *People v. Green* (1980) 27 Cal.3d 1, 57–58 [164 Cal.Rptr. 1, 609 P.2d 468] [defendant intended to destroy the property], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Pierce* (1952) 110 Cal.App.2d 598, 609 [243 P.2d 585] [irrelevant that defendant did not personally benefit from embezzled funds]; see also *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [intent to deprive owner of major value or enjoyment].)

Possession

The victim of a theft does not have to be the owner of property, only in possession of it. (*People v. Edwards* (1925) 72 Cal.App. 102, 116 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].) "Considered as an element of larceny, 'ownership' and 'possession' may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner." (*Ibid;* see also *People v. Davis* (1893) 97 Cal. 194, 195 [31 P. 1109] [fact that property in possession of victim sufficient to show ownership].)

Unanimity of Theft Theory Not Required

If multiple theories of theft have been presented, the jury does not need to agree on which form of theft was committed. All the jury must agree on is that an unlawful taking of property occurred. (*People v. Counts* (1995) 31 Cal.App.4th 785, 792–793 [37 Cal.Rptr.2d 425]; *People v. Failla* (1966) 64 Cal.2d 560, 567–569 [51 Cal.Rptr. 103, 414 P.2d 39] [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [233 P.2d 897] [addressing the issue for theft].) See CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft.*

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1801. Theft: Degrees

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[The defendant committed grand theft if (he/she) stole property [or services] worth more than $400.]

[Theft of property from the person is grand theft, no matter how much the property is worth. Theft is *from the person* if the property taken was in the clothing of, on the body of, or in a container held or carried by, that person.]

[Theft of (an automobile/a firearm/a horse/_____ *<insert other item listed in statute>*) **is grand theft.]**

[Theft of (fruit/nuts/_____ *<insert other item listed in statute>*) **worth more than $100 is grand theft.]**

[Theft of (fish/shellfish/aquacultural products/_____ *<insert other item listed in statute>*) **worth more than $100 is grand theft if (it/they) (is/are) taken from a (commercial fishery/research operation).]**

[The value of avocados or citrus fruits may be established by evidence proving that on the day of the theft, avocados or citrus fruits of the same variety and weight as those stolen had a wholesale value of more than $100.]

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).]

<Fair Market Value—Generally>

[*Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]

<Fair Market Value—Urgent Sale>

[*Fair market value* is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

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All other theft is petty theft.

The People have the burden of proving beyond a reasonable doubt that the theft was grand theft rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of grand theft.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if grand theft has been charged.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

- Determination of Degrees. Pen. Code, §§ 486, 487–488, 491.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property § 4.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

RELATED ISSUES

Taking From the Person

To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472 [12 Cal.Rptr.2d 243].) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court's discussion of origins of this rule].) *Williams* was distinguished by the court in *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656–1657 [60 Cal.Rptr.2d 177], where evidence that the defendant took a purse placed on the floor next to

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and touching the victim's foot was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

Theft of Fish, Shellfish, or Aquacultural Products

If fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation producing such products, it is grand theft if the value of the fish or other products exceeds $100. (Pen. Code, § 487(b)(2).) Fish taken from public waters are not "property of another" within the meaning of Penal Code section 484 and 487; only the Fish and Game Code applies to such takings. (*People v. Brady* (1991) 234 Cal.App.3d 954, 959, 961–962 [286 Cal.Rptr. 19]; see, e.g., Fish & Game Code, § 12006.6 [unlawful taking of abalone].) If the fish are taken from any other private waters or from someone else's possession, the taking falls within the general theft provisions and must exceed $400 in value to be grand theft. (See Pen. Code, § 487(a).)

Value of Written Instrument

If the thing stolen is evidence of a debt or some other written instrument, its value is (1) the amount due or secured that is unpaid, or that might be collected in any contingency, (2) the value of the property, title to which is shown in the instrument, or (3) or the sum that might be recovered in the instrument's absence. (Pen. Code, § 492; see *Buck v. Superior Court* (1966) 245 Cal.App.2d 431, 438 [54 Cal.Rptr. 282] [trust deed securing debt]; *People v. Frankfort* (1952) 114 Cal.App.2d 680, 703 [251 P.2d 401] [promissory notes and contracts securing debt]; *People v. Quiel* (1945) 68 Cal.App.2d 674, 678 [157 P.2d 446] [unpaid bank checks]; see also Pen. Code, §§ 493 [value of stolen passage tickets], 494 [completed written instrument need not be issued or delivered].) If evidence of a debt or right of action is embezzled, its value is the sum due on or secured by the instrument. (Pen. Code, § 514.) Section 492 only applies if the written instrument has value and is taken from a victim. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, fn. 16 [79 Cal.Rptr.2d 806].)

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1802. Theft: As Part of Overall Plan

If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. **The defendant committed theft of property from the same owner or possessor on more than one occasion;**
2. **The combined value of the property was over ($400/$100);**

AND

3. **The defendant obtained the property as part of a single, overall plan or objective.**

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken if grand theft is charged on that theory.

The total value of the property taken usually must exceed $400 to be grand theft. (See Pen. Code, § 487(a).) For some types of property, however, the property taken need only exceed $100 in value to constitute grand theft. (See, e.g., Pen. Code, § 487(b)(1) [farm products] & (2) [commercially grown fish, shellfish, or aquacultural products]; see also CALCRIM No. 1801, *Theft: Degrees*.) In element 2, select the appropriate value depending on what type of property was taken.

AUTHORITY

- Aggregating Value of Property Taken According to Overall Plan or General Intent. *People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39].
- Grand Theft of Property or Services. Pen. Code, § 487(a) [property or services exceeding $400 in value].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 11, 12.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1][i] (Matthew Bender).

RELATED ISSUES

Multiple Victims

Where multiple victims are involved, there is disagreement about applying the *Bailey* doctrine and cumulating the charges even if a single plan or intent is demonstrated. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30 [210 Cal.Rptr. 90] [auctioneer stole proceeds from property belonging to several people during a single auction; conviction for multiple counts of theft was error]; *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33 [163 Cal.Rptr. 455] [series of petty thefts from numerous victims occurring over 10-month period properly consolidated into single grand theft conviction where defendant employed same scheme to defraud victims of money]; but see *People v. Garcia* (1990) 224 Cal.App.3d 297, 307–309 [273 Cal.Rptr. 666] [defendant filed fraudulent bonds at different times involving different victims; multiple convictions proper]; *In re David D.* (1997) 52 Cal.App.4th 304, 309 [60 Cal.Rptr.2d 552] [stating that *Garcia* "articulately criticized" *Brooks* and *Columbia Research*; declined to apply *Bailey* to multiple acts of vandalism].)

Combining Grand Thefts

The *Bailey* doctrine can be asserted by the *defendant* to combine multiple grand thefts committed as part of an overall scheme into a single offense. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [210 Cal.Rptr. 90] [multiple grand thefts from single auction fund]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47–48 [153 Cal.Rptr. 160] [multiple grand theft of hog carcasses]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120] [multiple attempted grand thefts], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [156 Cal.Rptr. 871, 597 P.2d 130]; see also *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19 [145 Cal.Rptr. 313] [error to refuse defense instruction about aggregating thefts].)

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Theft Enhancement

If there are multiple charges of theft, whether grand or petty theft, the aggregate loss exceeds any of the statutory minimums in Penal Code section 12022.6(a), and the thefts arise from a common scheme or plan, an additional prison term may be imposed. (Pen. Code, § 12022.6(b).) If the aggregate loss exceeds statutory amounts ranging from $50,000 to $2.5 million, an additional term of one to four years may be imposed. (Pen. Code, § 12022.6(a)(1)–(4); see *People v. Daniel* (1983) 145 Cal.App.3d 168, 174–175 [193 Cal.Rptr. 277] [no error in refusing to give unanimity instruction].)

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1803. Theft: By Employee or Agent

If you conclude that the defendant committed more than one theft, you must decide whether the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. **The defendant was an (employee/agent) of _____ <*insert name of employer/principal*>;**
2. **The defendant committed theft of property [or services] from _____ <*insert name of employer/principal*>;**

AND

3. **The combined value of the property [or services] that the defendant obtained during a period of 12 consecutive months was $400 or more.**

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.

[An *agent* is a person who represents someone else in dealing with other people, corporations, or entities.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken by an employee or agent if grand theft is charged on that theory.

AUTHORITY

- Aggregating Value of Property Taken by Employee or Agent. Pen. Code, § 487(b)(3); *People v. Packard* (1982) 131 Cal.App.3d 622, 626–627 [182 Cal.Rptr. 576].
- Agent Defined. Civ. Code, § 2295.
- Employee Defined. Lab. Code, § 2750.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 11, 12.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1][a] (Matthew Bender).

COMMENTARY

Penal Code section 487(b)(3) allows the prosecutor, under specified conditions, to cumulate a series of petty thefts into a grand theft, without having to prove a single intent or scheme. (*People v. Packard* (1982) 131 Cal.App.3d 622, 626 [182 Cal.Rptr. 576].) Therefore, this instruction does not include a single intent or scheme as an element. (Compare *People v. Daniel* (1983) 145 Cal.App.3d 168, 175 [193 Cal.Rptr. 277] [theft pursuant to overall plan and single fraudulent intent], and CALCRIM No. 1802, *Theft: As Part of Overall Plan*.) Under the appropriate circumstances, however, a *defendant* may assert that grand thefts committed against his or her employer over a period greater than 12 consecutive months should be combined into a single grand theft in the absence of evidence of separate intents or plans. (See *People v. Packard, supra,* 131 Cal.App.3d at pp. 626–627 [thefts over three-year period].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1802, *Theft: As Part of Overall Plan*.

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1804. Theft by False Pretense

The defendant is charged [in Count ____] with [grand/petty] theft by false pretense.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant knowingly and intentionally deceived a property owner [or the owner's agent] by false or fraudulent representation or pretense;**
2. **The defendant did so intending to persuade the owner [or the owner's agent] to let the defendant [or another person] take possession and ownership of the property;**
3. **The owner [or the owner's agent] let the defendant [or another person] take possession and ownership of the property because the owner [or the owner's agent] relied on the representation or pretense;**

AND

4. **When the defendant acted, (he/she) intended (to deprive the owner of the property permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

You may not find the defendant guilty of this crime unless the People have proved that:

[A. The false pretense was accompanied by either a writing or false token(;/.)]

[OR]

[(A/B). There was a note or memorandum of the pretense signed or handwritten by the defendant(;/.)]

[OR]

[(A/B/C). Testimony from two witnesses or testimony from a single witness along with other evidence supports the conclusion that the defendant made the pretense.]

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[*Property* includes money, labor, and real or personal property.]

A *false pretense* is any act, word, symbol, or token the purpose of which is to deceive.

[Someone makes a false pretense if, intending to deceive, he or she does [one or more of] the following:

[1. Gives information he or she knows is false(./;)]

[OR

2. Makes a misrepresentation recklessly without information that justifies a reasonable belief in its truth(./;)]

[OR

3. Does not give information when he or she has an obligation to do so(./;)]

[OR

4. Makes a promise not intending to do what he or she promises.]]

[Proof that the representation or pretense was false is not enough by itself to prove that the defendant intended to deceive.]

[Proof that the defendant did not perform as promised is not enough by itself to prove that the defendant did not intend to perform as promised.]

[A false token is a document or object that is not authentic, but appears to be, and is used to deceive.]

[For petty theft, the property taken can be of any value, no matter how slight.]

[An owner [or an owner's agent] relies on false pretense, if the falsehood is an important part of the reason the owner [or agent] decides to give up the property. The false pretense must be an important factor, but it does not have to be the only factor the owner [or agent] considers in making the decision. [If the owner [or agent] gives up property some time after the pretense is made, the owner [or agent] must do so because he or she relies on the pretense.]]

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[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime, including the corroboration requirements stated in Penal Code section 532(b). (*People v. Mason* (1973) 34 Cal.App.3d 281, 286 [109 Cal.Rptr. 867] [error not to instruct on corroboration requirements].)

To have the requisite intent for theft, the thief must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 4.

Related Instructions

If the defendant is also charged with grand theft, give CALCRIM No. 1801, *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

AUTHORITY

- Elements. Pen. Code § 484; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842 [52 Cal.Rptr.2d 765]; see *People v. Webb* (1999) 74 Cal.App.4th 688, 693–694 [88 Cal.Rptr.2d 259] [false statement of opinion].
- Corroboration Requirements. Pen. Code § 532(b); *People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Fujita* (1974) 43 Cal.App.3d 454, 470–471 [117 Cal.Rptr. 757].
- Agent. *People v. Britz* (1971) 17 Cal.App.3d 743, 753 [95 Cal.Rptr. 303].
- Intent to Deprive Owner of Main Value. *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to

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extent it is inconsistent, *People v. Marquez* (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365].

- Reckless Misrepresentation. *People v. Schmitt* (1957) 155 Cal.App.2d 87, 110 [317 P.2d 673]; *People v. Ryan* (1951) 103 Cal.App.2d 904, 908–909 [230 P.2d 359].
- Defendant Need Not Be Beneficiary of Theft. *People v. Cheeley* (1951) 106 Cal.App.2d 748, 753.
- Reliance. *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842–1843 [52 Cal.Rptr.2d 765] [defining reliance]; *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413 [79 Cal.Rptr.2d 806] [reversible error to fail to instruct on reliance]; *People v. Whight* (1995) 36 Cal.App.4th 1143, 1152–1153 [43 Cal.Rptr.2d 163] [no reliance if victim relies solely on own investigation].
- Theft of Real Property by False Pretenses. *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 12, 64.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.

RELATED ISSUES

Attempted Theft by False Pretense

Reliance on the false pretense need not be proved for a person to be guilty of attempted theft by false pretense. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 467 [117 Cal.Rptr. 757].)

Continuing Nature of False Pretense

Penal Code section 484 recognizes that theft by false pretense is a crime of a continuing nature and covers any "property or service received as a result thereof, and the complaint, information or indictment may charge that the

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crime was committed on any date during the particular period in question." (Pen. Code, § 484(a).)

Corroboration–Defined/Multiple Witnesses

"Corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way so as to reasonably satisfy the jury that the complaining witness is telling the truth." (*People v. Fujita* (1974) 43 Cal.App.3d 454, 470 [117 Cal.Rptr. 757].) When considering if the pretense is corroborated the jury may consider "the entire conduct of the defendant, and his declarations to other persons." (*People v. Wymer* (1921) 53 Cal.App. 204, 206 [199 P. 815].) The test for corroboration of false pretense is the same as the test for corroborating the testimony of an accomplice in Penal Code section 1111. (*Ibid.*; see also *People v. MacEwing* (1955) 45 Cal.2d 218, 224 [288 P.2d 257].) To establish corroboration by multiple witnesses, the witnesses do not have to testify to the same false pretense. The requirement is satisfied as long as they testify to the same scheme or type of false pretense. (*People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Ashley* (1954) 42 Cal.2d 246, 268 [267 P.2d 271].)

Distinguished from Theft by Trick

Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258 [267 P.2d 271]; *People v. Randono* (1973) 32 Cal.App.3d 164, 172 [108 Cal.Rptr. 326].) False pretenses does not require that the title pass perfectly and the victim may even retain a security interest in the property transferred to the defendant. (*People v. Counts* (1995) 31 Cal.App.4th 785, 789–792 [37 Cal.Rptr.2d 425].)

Fraudulent Checks

If a check is the basis for the theft by false pretense, it cannot also supply the written corroboration required by statute. (*People v. Mason* (1973) 34 Cal.App.3d 281, 288 [109 Cal.Rptr. 867].)

Genuine Writings

A genuine writing that is falsely used is not a false token. (*People v. Beilfuss* (1943) 59 Cal.App.2d 83, 91 [138 P.2d 332] [valid check obtained by fraud not object of theft by false pretense].)

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Implicit Misrepresentations

The misrepresentation does not have to be made in an express statement; it may be implied from behavior or other circumstances. (*People v. Mace* (1925) 71 Cal.App. 10, 21 [234 P. 841]; *People v. Randono* (1973) 32 Cal.App.3d 164, 174–175 [108 Cal.Rptr. 326] [analogizing to the law of implied contracts].)

Non-Performance of a Promise Is Insufficient to Prove a False Pretense

The pretense may be made about a past or present fact or about a promise to do something in the future. (*People v. Ashley* (1954) 42 Cal.2d 246, 259–265 [267 P.2d 271].) If the pretense relates to future actions, evidence of non-performance of the promise is not enough to establish the falsity of a promise. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469 [117 Cal.Rptr. 757].) The intent to defraud at the time the promise is made must be demonstrated. As the court in *Ashley* stated, "[w]hether the pretense is a false promise or a misrepresentation of fact, the defendant's intent must be proved in both instances by something more than mere proof of non-performance or actual falsity." (*People v. Ashley, supra,* 42 Cal.2d at p. 264 [court also stated that defendant is entitled to instruction on this point but did not characterize duty as sua sponte].)

See the Related Issues section under CALCRIM No. 1800, *Theft by Larceny*.

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1805. Theft by Trick

The defendant is charged [in Count ____] with [grand/petty] theft by trick.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant obtained property that (he/she) knew was owned by someone else;**
2. **The property owner [or the owner's agent] consented to the defendant's possession of the property because the defendant used fraud or deceit;**
3. **When the defendant obtained the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property);**
4. **The defendant kept the property for any length of time;**

AND

5. **The owner [or the owner's agent] did not intend to transfer ownership of the property.**

[Obtaining the owner's [or the owner's agent's] consent to use the property for a specified purpose while intending to use it in a different way constitutes fraud or deceit.]

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

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To have the requisite intent for theft, the thief must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 3.

Related Instructions

If the defendant is also charged with grand theft, give CALCRIM No. 1801, *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

AUTHORITY

- Elements of Theft. Pen. Code, § 484.
- Intent to Deprive Owner of Main Value. *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to extent it is inconsistent, *People v. Marquez* (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 12, 64.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.

RELATED ISSUES

Distinguished From Theft by False Pretense

Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only

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possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258 [267 P.2d 271]; *People v. Randono* (1973) 32 Cal.App.3d 164, 172 [108 Cal.Rptr. 326]; *People v. Traster* (2003) 111 Cal.App.4th 1377, 1387 [4 Cal.Rptr.3d 680].)

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1806. Theft by Embezzlement

The defendant is charged [in Count ____] with [grand/petty] theft by embezzlement.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **An owner [or the owner's agent] entrusted (his/her) property to the defendant;**
2. **The owner [or owner's agent] did so because (he/she) trusted the defendant;**
3. **The defendant (converted/used) that property for (his/her) own benefit;**

AND

4. **When the defendant converted the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

If the defendant is charged with grand theft, give CALCRIM No. 1801 *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

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If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

AUTHORITY

- Elements. Pen. Code, §§ 484, 503–515; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845 [52 Cal.Rptr.2d 765].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.

RELATED ISSUES

Alter Ego Defense

A partner can be guilty of embezzling from his own partnership. "[T]hough [the Penal Code] requir[es] that the property be 'of another' for larceny, [it] does not require that the property be 'of another' for embezzlement. . . . It is both illogical and unreasonable to hold that a partner cannot steal from his partners merely because he has an undivided interest in the partnership property. Fundamentally, stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 464, 468 [106 Cal.Rptr. 519]; see Pen. Code, § 484.)

Fiduciary Relationships

Courts have held that creditor/debtor and employer/employee relationships are not presumed to be fiduciary relationships in the absence of other evidence of trust or confidence. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 [52 Cal.Rptr.2d 765] [creditor/debtor]; *People v. Threestar* (1985) 167 Cal.App.3d 747, 759 [213 Cal.Rptr. 510] [employer/employee].)

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1807. Theft From Elder or Dependent Adult

The defendant is charged [in Count ____] with theft of property from (an elder/a dependent adult).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed (theft[,]/ embezzlement[,]/ forgery[,]/ fraud[,]/ [or] identity theft);**
2. **The (property taken/ [or] personal identifying information used) was (owned by/that of) (an elder/a dependent adult);**
3. **The property, goods, or services obtained was worth (more than $400/$400 or less);**

AND

<Alternative 4A—defendant not caretaker>

[4. The defendant knew or reasonably should have known that the (owner of the property/person to whom the identifying information belonged) was (an elder/a dependent adult).]

[OR]

<Alternative 4B—defendant caretaker>

[4. The defendant was a caretaker of the (elder/dependent adult).]

To decide whether the defendant committed (theft[,]/ embezzlement[,]/ forgery[,]/ fraud[,]/ [or] identity theft), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.] [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also

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someone between 18 and 64 years old who is an inpatient in a [psychiatric] health facility [or chemical dependency recovery hospital/ or _____ <*insert relevant type of health facility from Health & Safety Code, § 1250*>] that provides 24-hour inpatient care.]

[A *caretaker* is someone who has the care, custody, or control of (a/an) (elder/dependent adult), or is someone who stands in a position of trust with (a/an) (elder/dependent adult).]

[*Property* includes money, labor, or real or personal property.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying theft offense.

In element 3, if the defendant is charged with taking property valued at more than $400, give the phrase "more than $400." (See Pen. Code, § 368(d), (e).) Otherwise, give the phrase "$400 or less."

If the person charged is not alleged to be a caretaker (see Pen. Code, § 368(i)), give alternative 4A. If the person charged stipulated to be a caretaker, give alternative 4B. If it is in dispute whether the person charged is a caretaker, give both alternatives 4A and 4B and the bracketed paragraph defining caretaker.

Give the bracketed definition of "elder" or "dependent adult" (see Pen. Code, § 368(g), (h)) on request depending on the evidence in the case. Give the second and/or third bracketed sentences of the definition of "dependent adult" if a further definition is requested.

The definition of "property" may be given on request. (See Pen. Code, § 368(d), (e).)

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

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AUTHORITY

- Elements. Pen. Code, § 368(d), (e).
- Caretaker Defined. Pen. Code, § 368(i).
- Dependent Adult Defined. Pen. Code, § 368(h).
- Elder Defined. Pen. Code, § 368(g).
- 24-Hour Health Facility. Health & Saf. Code, §§ 1250, 1250.2, 1250.3.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Theft From Elder or Dependent Adult. Pen. Code, §§ 664, 368(d), (e).
- Theft. Pen. Code, § 484.

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1808–1819. Reserved for Future Use

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B. TAKING OR TAMPERING WITH VEHICLE

1820. Unlawful Taking or Driving of Vehicle

The defendant is charged [in Count ____] with unlawfully taking or driving a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took or drove someone else's vehicle without the owner's consent;**

AND

2. **When the defendant did so, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time.**

[Even if you conclude that the owner had allowed the defendant or someone else to take or drive the vehicle before, you may not conclude that the owner consented to the driving or taking on _____ <*insert date of alleged crime*> based on that previous consent alone.]

[A *taking* requires that the vehicle be moved for any distance, no matter how small.]

[A *vehicle* includes a (passenger vehicle/motorcycle/motor scooter/ bus/schoolbus/commercial vehicle/truck tractor/ [and] trailer/ [and] semitrailer/_____ <*insert other type of vehicle*>).]

<Sentencing Factor: Ambulance, Police Vehicle, Fire Dept. Vehicle>

[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove an emergency vehicle on call. To prove this allegation, the People must prove that:

1. **The vehicle was (an ambulance/a distinctively marked law enforcement vehicle/a distinctively marked fire department vehicle);**

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2. The vehicle was on an emergency call when it was taken;

AND

3. The defendant knew that the vehicle was on an emergency call.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.]

<Sentencing Factor: Modified for Disabled Person>

[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove a vehicle modified for a disabled person. To prove this allegation, the People must prove that:

1. The vehicle was modified for the use of a disabled person;

2. The vehicle displayed a distinguishing license plate or placard issued to disabled persons;

AND

3. The defendant knew or reasonably should have known that the vehicle was so modified and displayed the distinguishing plate or placard.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges that the vehicle was an emergency vehicle or was modified for a disabled person, the court has a **sua sponte** duty to instruct on the sentencing factor. (Veh. Code, § 10851(b); see Veh. Code, § 10851(d) [fact issues for jury].)

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If the defendant is charged with unlawfully driving or taking an automobile and with receiving the vehicle as stolen property, and there is evidence of only one act or transaction, the trial court has a **sua sponte** duty to instruct the jury that the defendant cannot be convicted of both stealing the vehicle and receiving a stolen vehicle. (*People v. Black* (1990) 222 Cal.App.3d 523, 525 [271 Cal.Rptr. 771]; *People v. Strong* (1994) 30 Cal.App.4th 366, 376 [35 Cal.Rptr.2d 494].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*.

Similarly, a defendant cannot be convicted of grand theft of a vehicle and unlawfully taking the vehicle in the absence of any evidence showing a substantial break between the taking and the use of the vehicle. (*People v. Kehoe* (1949) 33 Cal.2d 711, 715 [204 P.2d 321]; see *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 [93 Cal.Rptr. 782] [finding substantial lapse between theft and driving].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*.

The bracketed paragraph that begins with "Even if you conclude that" may be given on request if there is evidence that the owner of the vehicle previously agreed to let the defendant or another person drive or take the vehicle. (Veh. Code, § 10851(c).)

The bracketed sentence defining "taking" may be given on request if there is a question whether a vehicle that was taken was moved any distance. (*People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862].)

The definition of "vehicle" may be given on request. (See Veh. Code, § 670 ["vehicle" defined].)

AUTHORITY

- Elements. Veh. Code, § 10851(a), (b); *De Mond v. Superior Court* (1962) 57 Cal.2d 340, 344 [368 P.2d 865].
- Ambulance Defined. Veh. Code, § 165(a).
- Owner Defined. Veh. Code, § 460.
- Application to Trolley Coaches. Veh. Code, § 21051.
- Expiration of Owner's Consent to Drive. *People v. Hutchings* (1966) 242 Cal.App.2d 294, 295 [51 Cal.Rptr. 415].
- Taking Defined. *People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862] [any removal, however slight, constitutes taking]; *People v. Frye* (1994) 28 Cal.App.4th 1080, 1088 [34 Cal.Rptr.2d 180] [taking is limited to removing vehicle from owner's possession].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 66–71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10A, Ch. 143, *Crimes Against Property*, § 143.01[1][j], [2][c], [4][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Unlawful Driving or Taking of Vehicle. Pen. Code, § 664; Veh. Code, § 10851(a), (b).

RELATED ISSUES

Other Modes of Transportation

The "joyriding" statute, Penal Code section 499b, now only prohibits the unlawful taking of bicycles, motorboats, or vessels. The unlawful taking or operation of an aircraft is a felony, as prohibited by Penal Code section 499d.

Community Property

A spouse who takes a community property vehicle with the intent to temporarily, not permanently, deprive the other spouse of its use is not guilty of violating Vehicle Code section 10851. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1739–1740 [60 Cal.Rptr.2d 357].)

Consent Not Vitiated by Fraud

The fact that an owner's consent was obtained by fraud or misrepresentation does not supply the element of nonconsent. (*People v. Cook* (1964) 228 Cal.App.2d 716, 719 [39 Cal.Rptr. 802].)

Theft-Related Convictions

A person cannot be convicted of taking a vehicle and receiving it as stolen property unless the jury finds that the defendant unlawfully drove the vehicle, as opposed to unlawfully taking it, and there is other evidence that establishes the elements of receiving stolen property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Cratty* (1999) 77 Cal.App.4th 98, 102–103 [91 Cal.Rptr.2d 370]; *People*

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v. Strong (1994) 30 Cal.App.4th 366, 372–374 [35 Cal.Rptr.2d 494].)

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1821. Tampering With a Vehicle

The defendant is charged [in Count ____] with (damaging/ [or] tampering with) a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—damaged or tampered with>

[1. The defendant willfully (damaged/ [or] tampered with) someone else's vehicle [or the contents of that vehicle];]

<Alternative 1B—broke or removed part of>

[1. The defendant willfully (broke/ [or] removed) part of someone else's vehicle;]

[AND]

2. The defendant did not have the owner's consent to do that act(;/.)

<Give element 3 when instructing on "in association with" others.>

[AND

3. The defendant acted in association with one or more other persons.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A *vehicle* is a device by which people or things may be moved on a road or highway. A vehicle does not include a device that is moved only by human power or used only on stationary rails or tracks.]

[A person acts *in association with one or more other people,* when he or she joins with another to accomplish a common unlawful purpose.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges that the defendant did not personally commit the act of tampering but acted "in association with" others, give bracketed element 3 and the paragraph that begins with "A person acts *in association . . .*" (*People v. Farina* (1963) 220 Cal.App.2d 291, 294 [33 Cal.Rptr. 794].) The court has a **sua sponte** duty to also give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The statute uses the term "injure." (Veh. Code, § 10852.) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

Give the bracketed definition of vehicle on request.

AUTHORITY

- Elements. Veh. Code, § 10852.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Vehicle Defined. Veh. Code, § 670.
- "In Association With" Means to Conspire With. *People v. Farina* (1963) 220 Cal.App.2d 291, 294 [33 Cal.Rptr. 794].
- Tamper Defined. *People v. Anderson* (1975) 15 Cal.3d 806, 810–811 [126 Cal.Rptr. 235, 543 P.2d 603]; *People v. Mooney* (1983) 145 Cal.App.3d 502, 505 [193 Cal.Rptr. 381].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 262.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10[1][b], [2][c] (Matthew Bender).

(New January 2006)

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1822. Unlawful Taking of Bicycle or Vessel

The defendant is charged [in Count ____] with unlawfully taking a (bicycle/vessel).

To prove that the defendant is guilty of this charge, the People must prove that:

1. **The defendant took someone else's (bicycle/vessel) without the owner's consent;**

AND

2. **When the defendant acted, (he/she) intended to use [or operate] the (bicycle/vessel) for any period of time.**

[A *taking* requires that the (bicycle/vessel) be moved for any distance, no matter how slight.]

[A *vessel* includes ships of all kinds, steamboats, steamships, canal boats, barges, sailing vessels, and any structure intended to transport people or merchandise over water.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The defendant cannot be convicted of both unlawfully taking a bicycle or vessel and receiving the same item as stolen property where there is evidence of only one act or transaction. (See *People v. Black* (1990) 222 Cal.App.3d 523, 525 [271 Cal.Rptr. 771]; *People v. Strong* (1994) 30 Cal.App.4th 366, 376 [35 Cal.Rptr.2d 494].) Similarly, a defendant cannot be convicted of both an unlawful taking and theft of the same item in the absence of evidence showing a substantial break between the theft and the use of the property. (See *People v. Kehoe* (1949) 33 Cal.2d 711, 715 [204 P.2d 321]; *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 [93 Cal.Rptr. 782].) In such cases, the court has a **sua sponte** duty to instruct the jury that the defendant cannot be convicted of both offenses. Give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*.

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On request, give the bracketed definition of "taking." (*People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862].)

If the defendant is charged with a felony based on a qualifying prior conviction under Penal Code section 499, the court must give either CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant stipulates to the truth of the conviction.

AUTHORITY

- Elements. Pen. Code, § 499b.
- Felony Offense If Qualifying Prior Conviction. Pen. Code, § 499.
- Vessel Defined. Harb. & Nav. Code, § 21.
- Taking Defined. *People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862]; *People v. Frye* (1994) 28 Cal.App.4th 1080, 1088 [34 Cal.Rptr.2d 180].
- Expiration of Owner's Consent. *People v. Hutchings* (1966) 242 Cal.App.2d 294, 295 [51 Cal.Rptr. 415].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property* § 143.01[1][j], [4][e] (Matthew Bender).

COMMENTARY

Prior to 1997, this statute also applied to the taking of vehicles. (See *People v. Howard* (1997) 57 Cal.App.4th 323, 326, fn. 2 [66 Cal.Rptr.2d 849].) The Legislature determined that the previous statute was duplicative of Vehicle Code section 10851 and, therefore, restricted the scope of the statute to only bicycles and, later, vessels. (Stats. 1996, ch. 660, § 3; see *People v. Howard, supra,* 57 Cal.App.4th at p. 326, fn. 2.)

Prior to this amendment, a split in authority developed over whether this is a specific-intent crime. The statute requires that the defendant take the item "for the purpose of temporarily using or operating" it. (Pen. Code, § 499b(a) & (b).) Analyzing the statute when it still applied to vehicles, the majority of cases held that this required the specific intent to use or

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operate the vehicle. (*People v. Howard* (1997) 57 Cal.App.4th 323, 327–328 [66 Cal.Rptr.2d 849]; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1663–1664 [4 Cal.Rptr.2d 66]; *People v. Diaz* (1989) 212 Cal.App.3d 745, 749–751 [260 Cal.Rptr. 806].) One case, however, held that this was a general-intent crime requiring only that the vehicle be taken by an act of driving or operating. (*People v. Frye* (1994) 28 Cal.App.4th 1080, 1090–1091 [34 Cal.Rptr.2d 180].) The reasoning of the court in *People v. Frye, supra*, is based on the premise that one "takes" a vehicle by driving or operating it. (*Id.* at p. 1091 ["the 'taking' proscribed by Penal Code section 499b is an act of taking possession through driving . . . ."].) As discussed in *People v. Howard, supra,* however, one may "take" a vehicle without driving or operating it, such as by towing it. This distinction is even more apparent in the context of bicycles and vessels, the only items now covered by the statute. One can "take" a bicycle without using or operating it by simply carrying it away. Similarly, if a vessel is on land, one can "take" it without using or operating it by towing it away. In such circumstances, it would appear that the person has not violated Penal Code section 499b unless there is some evidence that he or she also intends to use or operate the bicycle or vessel. Thus, in light of the amendments to the statute, the committee believes that the reasoning of *Howard* and *Diaz, supra,* finding this to be a specific-intent crime, is more persuasive.

LESSER INCLUDED OFFENSES

- Attempted Unlawful Taking of Bicycle or Vessel. Pen. Code, § 664; Pen. Code, § 499b.

If the defendant is charged with a felony based on a prior conviction, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. If the jury finds that the prior conviction has not been proved, then the offense should be set at a misdemeanor.

(New January 2006)

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C. EXTORTION

1830. Extortion by Threat or Force

The defendant is charged [in Count ____] with extortion by (threat/ [or] force).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—threatened to injure or used force>

[1. The defendant (threatened to unlawfully injure/ [or] used force against) (another person or a third person/ [or] the property of another person or a third person);]

<Alternative 1B—threatened to accuse of crime>

[1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime;]

<Alternative 1C—threatened to expose secret>

[1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with a (disgrace[,]/ [or] crime[,]/ [or] deformity)];]

2. When (making the threat/ [or] using force), the defendant intended to use that (fear/ [or] force) to obtain the other person's consent (to give the defendant money [or property]/ [or] to do an official act);

3. As a result of the (threat/ [or] use of force), the other person consented (to give the defendant money [or property]/ [or] to do an official act);

AND

4. As a result of the (threat/ [or] use of force), the other person then (gave the defendant money [or property]/ [or] did an official act).

The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

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The (threat/use of force) must be the controlling reason that the other person consented. If the person consented because of some other controlling reason, the defendant is not guilty of extortion.

[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The threat may involve harm to be inflicted by the defendant or by someone else.]

[An *official act* is an act that a person does in his or her official capacity, using the authority of his or her public office.]

[A *secret* is a fact that:

1. **Is unknown to the general public or to someone who might be interested in knowing the fact;**

AND

2. **Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (give the defendant money[or property]/[or] do an official act) to prevent the fact from being revealed.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. (See *People v. Hesslink* (1985) 167 Cal.App.3d 781, 788–790 [213 Cal.Rptr. 465].)

Depending on the evidence, in element 1, give the appropriate alternative A–C describing the threat. (Pen. Code, § 519.)

Related Instructions

For an instruction on the crime of kidnapping for ransom, reward, or extortion, see CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*.

AUTHORITY

- Elements. Pen. Code, §§ 518, 519; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789 [213 Cal.Rptr. 465].

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- Specific Intent Required. *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789–790 [213 Cal.Rptr. 465].
- Felony Punishment. Pen. Code, § 520.
- Property Defined. Pen. Code, § 7(10) and (12); see *People v. Baker* (1978) 88 Cal.App.3d 115, 119 [151 Cal.Rptr. 362] [includes right to file administrative protest]; *People v. Cadman* (1881) 57 Cal. 562, 564 [includes right to prosecute appeal]; *People v. Kozlowski* (2002) 96 Cal.App.4th 853, 869 [117 Cal.Rptr.2d 504] [includes PIN code].
- Coerced Consent. *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536]; *People v. Peck* (1919) 43 Cal.App. 638, 645 [185 P. 881].
- Force or Fear Must Be Controlling Cause. *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536].
- Official Act Defined. See *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485] [kidnapping for extortion]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [same].
- Secret Defined. *People v. Lavine* (1931) 115 Cal.App. 289, 295 [1 P.2d 496].
- Threat of Harm by Third Person. *People v. Hopkins* (1951) 105 Cal.App.2d 708, 709–710 [233 P.2d 948].
- Unlawful Injury Defined. *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [94 P. 407].
- Wrongful Defined. *People v. Beggs* (1918) 178 Cal. 79, 83–84 [172 P. 152].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 103–108.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Extortion. Pen. Code, § 524; see *People v. Sales* (2004) 116 Cal.App.4th 741, 748–749 [10 Cal.Rptr.3d 527]; *People v. Franquelin* (1952) 109 Cal.App.2d 777, 783–784 [241 P.2d 651]; *Isaac*

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v. Superior Court (1978) 79 Cal.App.3d 260, 263 [146 Cal.Rptr. 396]; *People v. Lavine* (1931) 115 Cal.App. 289, 297 [1 P.2d 496].

RELATED ISSUES

No Defense of Good Faith

A good faith belief in the right to property does not negate the specific intent required for extortion. A debt cannot be collected by extortion. (*People v. Beggs* (1918) 178 Cal. 79, 84 [172 P. 152]; see *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305] [kidnapping for ransom].)

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1831. Extortion by Threatening Letter

The defendant is charged [in Count ____] with sending a threatening letter with the intent to extort.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant sent or delivered a threatening letter [or other writing] to another person;**

<Alternative 2A—threatened to injure>

[2. In the letter [or writing], the defendant threatened to unlawfully injure (the other person or someone else/ [or] the property of the other person or someone else);]

<Alternative 2B—threatened to accuse of crime>

[2. In the letter [or writing], the defendant threatened to accuse the other person[, or that person's relative or family member,] of a crime;]

<Alternative 2C—threatened to expose secret>

[2. In the letter [or writing], the defendant threatened to expose a secret about the other person[, or that person's relative or family member,] [or to expose or connect (him/ her/any of them) with a (disgrace[,]/ [or] crime[,]/ [or] deformity)];]

AND

3. **When sending or delivering the letter [or writing], the defendant intended to use fear to obtain (money [or property]/[or] the performance of an official act) with the other person's consent.**

The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

[The threat can be directly stated in the letter [or writing] or can be implied by the contents of the letter [or writing] and the surrounding circumstances or can be intended by the sender to be understood as a threat by the recipient.]

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[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The letter [or writing] does not need to be signed and does not need to have been (written/dictated/composed) by the defendant.]

[The crime is complete when the letter [or writing] is either delivered to someone or deposited in a post office or any other place, with the intent that the letter [or writing] be forwarded to the intended recipient. It is not required that the intended recipient actually receive the letter [or writing].]

[It is not required that the intended recipient actually (give the defendant money [or property]/ [or] do an official act).]

[An *official act* is an act that a person does in his or her official capacity, using the authority of his or her public office.]

[A *secret* is a fact that:

1. **Is unknown to the general public or to someone who might be interested in knowing the fact;**

AND

2. **Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (give the defendant money[or property]/ [or] do an official act) to prevent the fact from being revealed.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the evidence, in element 2, give the appropriate alternative A–C describing the threat. (Pen. Code, § 519.)

AUTHORITY

- Elements. Pen. Code, § 523.
- Crime Complete When Mailed. Pen. Code, § 660.

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- Felony Punishment. Pen. Code, § 520.
- Threats. Pen. Code, § 519.
- Coerced Consent. *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536]; *People v. Peck* (1919) 43 Cal.App. 638, 645 [185 P. 881] [extortion under Pen. Code, §§ 518, 519].
- Official Act Defined. See *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485] [kidnapping for extortion]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [same].
- Secret Defined. *People v. Lavine* (1931) 115 Cal.App. 289, 295 [1 P.2d 496] [extortion under Pen. Code, §§ 518, 519].
- Unlawful Injury Defined. *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [94 P. 407] [extortion under Pen. Code, §§ 518, 519].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 109.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.02 (Matthew Bender).

COMMENTARY

Adding "official act" to section 518 expanded the definition of extortion in the related code sections, including section 523, to include extortion of an official act. (*Isaac v. Superior Court* (1978) 79 Cal.App.3d 260, 263–264 [146 Cal.Rptr. 396].)

LESSER INCLUDED OFFENSES

- Attempted Extortion. Pen. Code, § 524.

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1832. Extortion of Signature

The defendant is charged [in Count ____] with obtaining a signature by extortion.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—threatened to injure or used force>

[1. The defendant (threatened to unlawfully injure/ [or] used force against) (another person or someone else/ [or] the property of another person or someone else);]

<Alternative 1B—threatened to accuse of crime>

[1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime;]

<Alternative 1C—threatened to expose secret>

[1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with a (disgrace[,]/ [or] crime[,]/ [or] deformity)];]

2. When (making the threat/ [or] using force), the defendant intended to use that (fear/ [or] force) to obtain the other person's signature on (a/an) (document/check/_____ <*specify other paper or instrument*>) that, if voluntarily signed, would transfer property or create a (debt/demand/ charge/right of legal action);

AND

3. As a result of the (threat/ [or] use of force), the other person signed the (document/check/_____ <*specify other paper or instrument*>).

[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The fear caused by the threat must be the controlling reason that the other person signed the document. If the person signed the document because of some other controlling reason, the defendant is not guilty of extortion.]

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[A *secret* is a fact that:

1. Is unknown to the general public or to someone who might be interested in knowing the fact;

AND

2. Harms the threatened person's reputation or other interest so greatly that he or she would be likely to sign (a/an) (document/check/_____ <*specify other paper or instrument*>) to prevent the fact from being revealed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the evidence, in element 1, give the appropriate alternative A–C describing the threat. (See Pen. Code, § 519.)

AUTHORITY

- Elements. Pen. Code, § 522.
- Coerced Consent. *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536]; *People v. Peck* (1919) 43 Cal.App. 638, 645 [185 P. 881] [extortion under Pen. Code, §§ 518, 519].
- Crime Complete When Document Signed. *People v. Massengale* (1970) 10 Cal.App.3d 689, 692 [89 Cal.Rptr. 237].
- Fear Must Be Controlling Cause. *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536] [extortion under Pen. Code, §§ 518, 519].
- Secret Defined. *People v. Lavine* (1931) 115 Cal.App. 289, 295 [1 P.2d 496] [extortion under Pen. Code, §§ 518, 519].
- Unlawful Injury Defined. *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [94 P. 407] [extortion under Pen. Code, §§ 518, 519].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 110.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Extortion. Pen. Code, § 524.

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D. PETTY THEFT WITH A PRIOR

1850. Petty Theft With Prior Conviction

If you find the defendant guilty of petty theft, you must then decide whether the People have proved the additional allegation that the defendant has been convicted of a theft offense before and served a term in a penal institution as a result of that conviction. It has already been determined that the defendant is the person named in exhibits _____ <*insert numbers or descriptions of exhibits*>**. You must decide whether the evidence proves that the defendant was previously convicted of the alleged crime[s].**

To prove this allegation, the People must prove that:

1. **The defendant was previously convicted of a theft offense;**

AND

2. **The defendant served a term in a penal institution for that conviction.**

The People allege that the defendant was previously convicted of:

[1.] A violation of _____ <*insert code section violated*>**, on** _____ <*insert date of conviction*>**, in the** _____ <*insert name of court*>**, in Case Number** _____ <*insert docket or case number*>**(;/.)**

[AND <*Repeat for each prior conviction alleged*>**.]**

[_____ <*insert name of penal institution*> **is a *penal institution*.]**

[A *penal institution* includes [a] (city jail/county jail/state prison/ any facility, camp, hospital, or institution operated to confine, treat, employ, train, and discipline persons in the legal custody of the Department of Corrections/federal prison/_____ <*specify other institution*>**).]**

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the

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crime[s] alleged [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing credibility of the defendant*>]. Do not consider this evidence for any other purpose.]

[You must consider each alleged conviction separately.] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior conviction. (See Pen. Code, § 1025 [on defendant's denial, jury must decide issue of prior convictions]; *People v. Barre* (1992) 11 Cal.App.4th 961, 965 [14 Cal.Rptr.2d 307].)

The prior conviction and incarceration requirement of Penal Code section 666 is a sentencing factor for the trial court and not an element of a section 666 offense. (*People v. Bouzas* (1991) 53 Cal.3d 467, 478–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Stevens* (1996) 48 Cal.App.4th 982, 987 [56 Cal.Rptr.2d 13].) Thus, the defendant may stipulate to the convictions. (*People v. Bouzas, supra,* 53 Cal.3d at pp. 478–480; *People v. Stevens, supra,* 48 Cal.App.4th at p. 987; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].)

Give this instruction only if the defendant does not stipulate and the court does not grant a bifurcated trial.

If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (Pen. Code, §§ 1025, 1093; see *People v. Bouzas, supra,* 53 Cal.3d at pp. 471–472, 480.)

If the court grants a bifurcated trial, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

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AUTHORITY

- Elements. Pen. Code, § 666; *People v. Bruno* (1987) 191 Cal.App.3d 1102, 1105 [237 Cal.Rptr. 31]; *People v. Bean* (1989) 213 Cal.App.3d 639, 642 [261 Cal.Rptr. 784].
- Convictions From Other States. Pen. Code, § 668; *People v. Perry* (1962) 204 Cal.App.2d 201, 204 [22 Cal.Rptr. 54].
- Prior Incarceration Requirement. *People v. James* (1957) 155 Cal.App.2d 604, 612 [312 P.2d 175] [service of partial term is sufficient]; *People v. Valenzuela* (1981) 116 Cal.App.3d 798, 803 [172 Cal.Rptr. 284] [custody resulting from credit for time served is sufficient]; but see *People v. Cortez* (1994) 24 Cal.App.4th 510, 513–514 [29 Cal.Rptr.2d 445] [participation in work release program alone is insufficient].
- Penal Institution Defined. *Ex parte Wolfson* (1947) 30 Cal.2d 20, 26 [180 P.2d 326] [includes county jail]; *People v. Valenzuela* (1981) 116 Cal.App.3d 798, 803, 804, 807–808 [172 Cal.Rptr. 284] [includes California Rehabilitation Center]; see Pen. Code, §§ 667.5(h) [defining state prison or federal penal institution for purposes of prior prison term enhancement], 969b [prima facie evidence of prior conviction and term served in any state or federal penitentiary, reformatory, or county or city jail], 6081, 6082 [prison defined]; Welf. & Inst. Code, § 851 [excludes juvenile hall].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 7.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 334.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony petty theft based on a prior conviction, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. If the jury finds that the prior conviction has not been proved, then the offense should be set at a misdemeanor.

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There is no crime of attempted petty theft with a prior conviction. None of the elements of Penal Code section 666 may be attempted. (*People v. Bean* (1989) 213 Cal.App.3d 639, 642, fn. 4 [261 Cal.Rptr. 784].)

RELATED ISSUES

Jury Findings on Prior Convictions

The jury must determine the truth of the prior conviction unless jury trial is waived or the defendant admits to the prior conviction. If more than one prior conviction is charged, the jury must make a separate finding on each charged prior. (Pen. Code, § 1158; *People v. Barre* (1992) 11 Cal.App.4th 961, 965–966 [14 Cal.Rptr.2d 307].)

Judicial Notice of Prior Conviction

It is error for a trial court to take judicial notice of a defendant's alleged prior conviction when a reasonable juror could only understand the notice to mean that the court conclusively determined the prior-conviction allegation to be true. (*People v. Barre* (1992) 11 Cal.App.4th 961, 965–966 [14 Cal.Rptr.2d 307].)

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E. THEFT RELATED INSTRUCTIONS

1860. Owner's Opinion of Value

A witness gave (his/her) opinion of the value of the property (he/she) [allegedly] owned. In considering the opinion, you may but are not required to accept it as true or correct. Consider the reasons the witness gave for any opinion, the facts or information on which (he/she) relied in forming that opinion, and whether the information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable or unreasonable. You may give the opinion whatever weight, if any, you believe it deserves.

BENCH NOTES

Instructional Duty

When the owner of property testifies about his or her opinion of the value of the property, give this instruction on request.

If an expert witness testified about its value, give CALCRIM No. 332, *Expert Witness Testimony*.

AUTHORITY

- Owner May Testify to Value. *People v. Coleman* (1963) 222 Cal.App.2d 358, 361 [35 Cal.Rptr. 141].
- Jury Must Decide What Weight to Give Owner Opinion. *People v. Pena* (1977) 68 Cal.App.3d 100, 102–103 [135 Cal.Rptr. 602].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 8.

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 18, 102.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1][i] (Matthew Bender).

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1861. Jury Does Not Need to Agree on Form of Theft

The defendant is charged [in Count ____] with theft.

The defendant has been prosecuted for theft under (two/_____ <*insert number*>) theories: _____ <*insert theories, e.g., theft by trick, theft by larceny, etc.*>.

Each theory of theft has different requirements, and I have instructed you on (both/all).

You may not find the defendant guilty of theft unless all of you agree that the People have proved that the defendant committed theft under at least one theory. But all of you do not have to agree on the same theory.

BENCH NOTES

Instructional Duty

Give this instruction when instructing on multiple forms of theft.

AUTHORITY

- Unanimity on Theft Theory Not Required. *People v. McLemore* (1994) 27 Cal.App.4th 601, 605 [32 Cal.Rptr.2d 687]; *People v. Counts* (1995) 31 Cal.App.4th 785, 792–793 [37 Cal.Rptr.2d 425]; *People v. Failla* (1966) 64 Cal.2d 560, 567–569 [51 Cal.Rptr. 103, 414 P.2d 39] [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [233 P.2d 897] [addressing the issue for theft].)

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 2–3.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

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1862. Return of Property Not a Defense to Theft

If you conclude that the People have proved that the defendant committed _____ <*insert charged theft crime*>, the return or offer to return (some/all) of the property wrongfully obtained is not a defense to that charge.

BENCH NOTES

Instructional Duty

An instruction that restoration of wrongfully obtained property is no defense to a charge of theft may be given on request. (See *People v. Pond* (1955) 44 Cal.2d 665, 674–675 [284 P.2d 793]; see also *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297 [34 Cal.Rptr.2d 483] [court need not instruct on its own motion on specific points developed at trial]; *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].)

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 512, 513; see *People v. Pond* (1955) 44 Cal.2d 665, 674–675 [284 P.2d 793].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 36.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1][e] (Matthew Bender).

RELATED ISSUES

Exception to Show Evidence of Intent

This instruction relates to wrongfully obtained property. However, a defendant may present evidence that he or she restored or improved property to show that his or her intent at the time of the taking was not larcenous. But there must be a relevant and probative link in the defendant's subsequent actions from which an original, innocent intent might be inferred. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1100–1101 [10 Cal.Rptr.2d 821].)

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Embezzlement of Public Funds

In a case of alleged embezzlement of public funds, it is error to instruct that restoration may be used to mitigate punishment. (*People v. Smith* (1929) 206 Cal. 235, 237 [273 P. 789]; *People v. Marquis* (1957) 153 Cal.App.2d 553, 558–559 [315 P.2d 57]; see Pen. Code, § 1203(e)(7) [probation prohibited for embezzlement of public funds].)

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1863. Defense to Theft or Robbery: Claim of Right

If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery).

The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it.

In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.

[The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.]

[The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.]

[The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.]

If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <*insert specific theft crime*>.

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BENCH NOTES

Instructional Duty

When a claim of right is supported by substantial evidence, the trial court must instruct **sua sponte** on the defense. (*People v. Creath* (1995) 31 Cal.App.4th 312, 319 [37 Cal.Rptr.2d 336]; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 [74 Cal.Rptr.2d 121, 954 P.2d 384] [no substantial evidence supporting inference of bona fide belief].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 511; *People v. Tufunga* (1999) 21 Cal.4th 935, 952, fn. 4 [90 Cal.Rptr.2d 143, 987 P.2d 168]; *People v. Romo* (1990) 220 Cal.App.3d 514, 517, 518 [269 Cal.Rptr. 440].
- Good Faith Belief. *People v. Stewart* (1976) 16 Cal.3d 133, 139–140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4, 10–11 [160 Cal.Rptr. 692].
- No Concealment of Taking. *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848–1849 [52 Cal.Rptr.2d 765].
- Not Available to Recover Unliquidated Claims. *People v. Holmes* (1970) 5 Cal.App.3d 21, 24–25 [84 Cal.Rptr. 889].
- Not Available to Recover From Notoriously or Known Illegal Activity. *People v. Gates* (1987) 43 Cal.3d 1168, 1181–1182 [240 Cal.Rptr. 666, 743 P.2d 301].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 32, 34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10[1][b], Ch. 143, *Crimes Against Property*, § 143.01[1][d] (Matthew Bender).

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CRIMINAL WRITINGS AND FRAUD

A. FORGERY

(i) Forging or Passing Document

1900. Forgery by False Signature
1901. Forgery by Endorsement
1902. Forgery of Handwriting or Seal
1903. Forgery by Altering or Falsifying Will or Other Legal Document
1904. Forgery by Falsifying, Altering, or Counterfeiting Document
1905. Forgery by Passing or Attempting to Use Forged Document
1906. Forging and Passing or Attempting to Pass: Two Theories in One Count
1907–1919. Reserved for Future Use

(ii) Counterfeit Driver's License

1920. Falsifying, Altering, or Counterfeiting a Driver's License
1921. Possessing or Displaying False, Altered, or Counterfeit Driver's License
1922–1924. Reserved for Future Use

(iii) Counterfeit Seal

1925. Forgery of Government, Public, or Corporate Seal
1926. Possession of Counterfeit Government, Public, or Corporate Seal
1927–1929. Reserved for Future Use

(iv) Possession With Intent to Defraud

1930. Possession of Forged Document
1931. Possession of Blank Check: With Intent to Defraud
1932. Possession of Completed Check: With Intent to Defraud
1933–1934. Reserved for Future Use

(v) Check Fraud

1935. Making, Passing, etc., Fictitious Check or Bill

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1936–1944. Reserved for Future Use

(vi) Filing False Document

1945. Procuring Filing of False Document or Offering False Document for Filing

1946–1949. Reserved for Future Use

B. ACCESS CARD FRAUD

1950. Sale or Transfer of Access Card or Account Number

1951. Acquiring or Retaining an Access Card or Account Number

1952. Acquiring or Retaining Account Information

1953. Making Counterfeit Access Card or Account Number

1954. Using or Attempting to Use Counterfeit Access Card

1955. False Signature on Access Card or Receipt

1956. Use of Forged, etc., Access Card

1957. Obtaining Money, etc., by Representing Self as Holder of Access Card

1958–1969. Reserved for Future Use

C. CHECK WITH INSUFFICIENT FUNDS

1970. Making, Using, etc., Check Knowing Funds Insufficient

1971. Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks

1972–1999. Reserved for Future Use

D. INSURANCE FRAUD

2000. Insurance Fraud: Fraudulent Claims

2001. Insurance Fraud: Multiple Claims

2002. Insurance Fraud: Vehicle Accident

2003. Insurance Fraud: Health-Care Claims—Total Value

2004. Insurance Fraud: Destruction of Insured Property

2005–2019. Reserved for Future Use

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E. FALSE FINANCIAL STATEMENT

2020. False Financial Statement: Making False Statement

2021. False Financial Statement: Obtaining Benefit

2022. False Financial Statement: Reaffirming Statement

2023. False Financial Statement: Use of False Identifying Information

2024–2039. Reserved for Future Use

F. IDENTITY THEFT

2040. Unauthorized Use of Personal Identifying Information

2041–2099. Reserved for Future Use

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A. FORGERY

(i) Forging or Passing Document

1900. Forgery by False Signature

The defendant is charged [in Count ____] with forgery committed by signing a false signature.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant signed (someone else's name/ [or] a false name) to [a/an] _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>;**
2. **The defendant did not have authority to sign that name;**
3. **The defendant knew that (he/she) did not have that authority;**

AND

4. **When the defendant signed the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged the following documents: _____ <*insert description of each document when multiple items alleged*>.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged at least

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one of these documents and you all agree on which document (he/she) forged.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements. Pen. Code, § 470(a).
- Signature Not Authorized—Element of Offense. *People v. Hidalgo* (1933) 128 Cal.App. 703, 707 [18 P.2d 391]; *People v. Maioli* (1933) 135 Cal.App. 205, 207 [26 P.2d 871].
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1][a], [d][2][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery. Pen. Code, §§ 664, 470.

RELATED ISSUES

Documents Not Specifically Listed in Penal Code Section 470(d)

A document not specifically listed in Penal Code section 470(d) may still come within the scope of the forgery statute if the defendant "forges the . . . handwriting of another." (Pen. Code, § 470(b).) "[A] writing not within those listed may fall under the part of section 470 covering a person who 'counterfeits or forges the . . . handwriting of another' if, on its face, the writing could possibly defraud anyone. [Citations.] The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].) The document must affect an identifiable legal, monetary, or property right. (*Id.* at p. 743; *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398–399 [265 Cal.Rptr. 855] [campaign letter with false signature of President Reagan could not be basis of forgery charge].) See CALCRIM No. 1902, *Forgery of Handwriting or Seal.*

Check Fraud

A defendant who forges the name of another on a check may be charged under either Penal Code section 470 or section 476, or both. (*People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66]; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586 [311 P.2d 927].) However, the defendant may not be convicted of and sentenced on both charges for the same conduct. (Pen. Code, § 654; *People v. Hawkins, supra,* 196 Cal.App.2d at pp. 839–840 [one count ordered dismissed]; see also CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event.*)

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Credit Card Fraud

A defendant who forges the name of another on a credit card sales slip may be charged under either Penal Code section 470 or section 484f, or both. (*People v. Cobb* (1971) 15 Cal.App.3d 1, 4.) However, the defendant may not be convicted and sentenced on both charges for the same conduct. (Pen. Code, § 654; see also CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*.)

Return of Property

Two cases have held that the defendant may present evidence that he or she returned some or all of the property in an effort to demonstrate that he or she did not originally intend to defraud. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 790 [66 Cal.Rptr. 319], disapproved on other grounds in *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780, fn. 11 [200 Cal.Rptr. 916, 677 P.2d 1206]; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308 [40 Cal.Rptr. 142].) However, other cases have held, based on the particular facts of the cases, that such evidence was not admissible. (*People v. Parker* (1970) 11 Cal.App.3d 500, 510 [89 Cal.Rptr. 815] [evidence that the defendant made full restitution following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [107 Cal.Rptr. 836] [evidence of restitution not relevant where defendant falsely signed the name of another to a check knowing he had no authority to do so].) If such evidence is presented, the court may give CALCRIM No. 1862, *Return of Property Not a Defense to Theft*. (*People v. Katzman, supra,* 258 Cal.App.2d at p. 791.) In addition, in *People v. Katzman, supra,* 258 Cal.App.2d at p. 792, the court held that, on request, the defense may be entitled to a pinpoint instruction that evidence of restitution may be relevant to determining if the defendant intended to defraud. If the court concludes that such an instruction is appropriate, the court may add the following language to the beginning of CALCRIM No. 1862:

> If the defendant returned or offered to return [some or all of the] property obtained, that conduct may show (he/she) did not intend to defraud. If you conclude that the defendant returned or offered to return [some or all of the] property, it is up to you to decide the meaning and importance of that conduct.

Inducing Mentally Ill Person to Sign Document

In *People v. Looney* (2004) 125 Cal.App.4th 242, 248 [22 Cal.Rptr.3d 502], the court held that the defendants could not be prosecuted for forgery

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where the evidence showed that the defendants induced a mentally ill person to sign legal documents transferring property to them. The court concluded that, because the defendants had accurately represented the nature of the documents to the mentally ill person and had not altered the documents after he signed, they did not commit forgery. *(Ibid.)*

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1901. Forgery by Endorsement

The defendant is charged [in Count ____] with forgery committed by endorsement.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant signed (the back of a check/(a/an) _____ <*insert type of negotiable instrument*>) with (the name of the payee of that (check/_____ <*insert type of negotiable instrument*>)/ [or] the name of another person whose signature was required to (cash that check/negotiate that instrument));**
2. **The defendant did not have authority to sign that name;**
3. **The defendant knew that (he/she) did not have that authority;**

AND

4. **When the defendant signed the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged the following documents: _____ <*insert description of each document when multiple items alleged*>.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged at least

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one of these documents and you all agree on which document (he/she) forged.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements. Pen. Code, § 470(a).
- Signature Not Authorized—Element of Offense. *People v. Hidalgo* (1933) 128 Cal.App. 703, 707 [18 P.2d 391]; *People v. Maioli* (1933) 135 Cal.App. 205, 207 [26 P.2d 871].
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Forgery by Endorsement. *People v. Maldonado* (1963) 221 Cal.App.2d 128, 133–134 [34 Cal.Rptr. 168]; *In re Valencia* (1927) 84 Cal.App. 26, 26 [259 P. 116].

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- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1][b], [c], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery. Pen. Code, §§ 664, 470.

RELATED ISSUES

See the Related Issues section of the Bench Notes for CALCRIM No. 1900, *Forgery by False Signature*.

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1902. Forgery of Handwriting or Seal

The defendant is charged [in Count ____] with forging [or counterfeiting] the (handwriting/seal) of another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant forged [or counterfeited] the (handwriting/seal) of another person on _____ <*insert type[s] of document[s] that could defraud; see discussion in Related Issues*>;**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged [or counterfeited] the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged [or counterfeited] at least one of these documents and you all agree on which document (he/she) forged [or counterfeited].]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements. Pen. Code, § 470(b).
- Applies to Document Not Listed in Penal Code Section 470(d). *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery. Pen. Code, §§ 664, 470.

RELATED ISSUES

Documents Not Specifically Listed in Penal Code Section 470(d)

A document not specifically listed in Penal Code section 470(d) may still come within the scope of the statute if the defendant "forges the . . . handwriting of another." (Pen. Code, 470(b).) However, not all writings are included within the scope of this provision. (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398–399 [265 Cal.Rptr. 855] [campaign letter with false signature of President Reagan could not be basis of forgery charge].) "[A] writing not within those listed may fall under the part of section 470 covering a person who 'counterfeits or forges the . . . handwriting of another' if, on its face, the writing could possibly defraud anyone. [Citations.] The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].) The document must affect an identifiable legal, monetary, or property right. (*Id.* at p. 743; see also *Lewis v. Superior Court, supra,* 217 Cal.App.3d at pp. 398–399.)

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1903. Forgery by Altering or Falsifying Will or Other Legal Document

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The defendant is charged [in Count ____] with forgery committed by (altering[,]/ corrupting[,]/ [or] falsifying) a legal document.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (altered[,]/ corrupted[,]/ [or] falsified) a document;**
2. **That document was [a record of] (a/an) (will[,]/ codicil[,]/ conveyance[,]/ [or] court judgment[,]/ [or] officer's return to a court's process/ [or other] legal writing that the law accepts as evidence);**

AND

3. **When the defendant (altered[,]/ [or] corrupted[,]/ [or] falsified) the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[Someone *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (altered[,]/ [or] corrupted[,]/ [or] falsified) the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless all of you agree

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that the People have proved that the defendant (altered[,]/ [or] corrupted[,]/ [or] falsified) at least one of these documents and you all agree on which document (he/she) (altered[,]/ [or] corrupted[,]/ [or] falsified).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

If the prosecution alleges that the document was "corrupted," the court may need to draft a definition of this term based on the evidence.

AUTHORITY

- Elements. Pen. Code, § 470(c).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.

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- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery. Pen. Code, §§ 664, 470.

(New January 2006)

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1904. Forgery by Falsifying, Altering, or Counterfeiting Document

The defendant is charged [in Count ____] with forgery committed by (falsely making[,]/ [or] altering[,]/ [or] forging[,]/ [or] counterfeiting) a document.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) (a/an) _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>;**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) at least one of these documents and you all agree

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on which document (he/she) (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements. Pen. Code, § 470(d).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery. Pen. Code, §§ 664, 470.

COMMENTARY

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added "or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false" after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase "falsifies the acknowledgment of any notary public" seems to refer back to "person" at the beginning of subdivision (d), but it's not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was "acknowledgement of a notary public," which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that "[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false" is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to

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make a notary's issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel's Digest of Assembly Bill 361 states that the bill makes it a "misdemeanor for a notary public to willfully fail to perform the required duties of a notary public" and makes "other related changes." The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

(New January 2006)

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1905. Forgery by Passing or Attempting to Use Forged Document

The defendant is charged [in Count ____] with forgery committed by (passing[,]/ [or] using[,]/ [or] (attempting/ [or] offering) to use) a forged document.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) [a/an] (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited)** _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>**;**
2. **The defendant knew that the** _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>**(was/were) (false[,]/ altered[,]/ [or] forged[,]/ [or] counterfeited);**

AND

3. **When the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the** _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>**, (he/she) intended that (it/they) be accepted as genuine and (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *(passes[,]/* [or] *uses[,]/* [or] *(attempts/* [or] *offers) to use)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

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[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) at least one document that was (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) and you all agree on which document (he/she) (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant passed or attempted to use multiple forged documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 CalRptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

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If the prosecution also alleges that the defendant forged the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements. Pen. Code, § 470(d).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Pass or Attempt to Use Defined. *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr.2d 585, 742 P.2d 1306].
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 169.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

COMMENTARY

The committee was unable to locate any authority for what constitutes "offering to pass" a forged document. In *People v. Compton* (1899) 123 Cal. 403, 409–411 [56 P. 44], the court held that attempting to pass a forged document requires, at a minimum, that the defendant present the document to an innocent party, with an assertion that the document is genuine. (*Ibid.*; see also *People v. Fork* (1965) 233 Cal.App.2d 725, 730–731 [43 Cal.Rptr. 804] [discussing sufficiency of the evidence for attempting to pass].) In light of this holding, it is unclear if any act less than this would be sufficient for a conviction for "offering to pass." The committee urges caution when considering whether to instruct the jury with the phrase "offering to pass."

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Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added "or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false" after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase "falsifies the acknowledgment of any notary public" seems to refer back to "person" at the beginning of subdivision (d), but it's not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was "acknowledgement of a notary public," which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that "[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false" is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary's issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel's Digest of Assembly Bill 361 states that the bill makes it a "misdemeanor for a notary public to willfully fail to perform the required duties of a notary public" and makes "other related changes." The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

(New January 2006)

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1906. Forging and Passing or Attempting to Pass: Two Theories in One Count

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The defendant is charged [in Count ____] with forgery of [a/an] _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>.

The defendant is being prosecuted for forgery under two theories: (1) that the defendant forged the document; and (2) that the defendant (passed[,]/ used[,]/ [or] (attempted/ [or] offered) to use) the forged document.

Each theory of forgery has different requirements, and I have instructed you on both.

You may not find the defendant guilty of forgery unless all of you agree that the People have proved that the defendant committed forgery under at least one theory. But all of you do not have to agree on the same theory.

BENCH NOTES

Instructional Duty

This instruction is to be given when the prosecution pursues the two theories of forgery of a single document in one count. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619 [21 Cal.Rptr.2d 752].)

AUTHORITY

- Unanimity on Theory Not Required. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 169.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

(New January 2006)

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(ii) Counterfeit Driver's License

1920. Falsifying, Altering, or Counterfeiting a Driver's License

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The defendant is charged [in Count ____] with (altering[,]/ [or] falsifying[,]/ [or] forging[,]/ [or] duplicating[,]/ [or] reproducing[,]/ [or] counterfeiting) a (driver's license/ [or] government-issued identification card).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited) a (driver's license/ [or] government-issued identification card);**

AND

2. **When the defendant did that act, (he/she) intended that the (driver's license/ [or] identification card) be used to help commit forgery.**

Someone *intends to commit forgery* if he or she intends to use a forged, counterfeit, altered, falsified, duplicated, or reproduced document to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or]

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counterfeited) the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited) at least one of these documents and you all agree on which document (he/she) (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 470a.
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Altered Driver's License. Veh. Code, § 14610.

(New January 2006)

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1921. Possessing or Displaying False, Altered, or Counterfeit Driver's License

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The defendant is charged [in Count ____] with (possessing[,]/ [or] displaying[,]/ [or] causing [or permitting] to be displayed) (an/a) (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited) (driver's license/ [or] government-issued identification card).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) a (driver's license/ [or] government-issued identification card);**
2. **The (driver's license/ [or] government-issued identification card) was (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited);**
3. **The defendant knew that the (driver's license/ [or] government-issued identification card) had been (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited);**

AND

4. **When the defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) the (driver's license/ [or] government-issued identification card), (he/she) intended that the document be used to commit forgery.**

Someone *intends to commit forgery* if he or she intends to use a forged, counterfeit, altered, falsified, duplicated, or reproduced document to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

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[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) the following documents: _____ <*insert description of each documents when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) at least one of these documents and you all agree on which document (he/she) (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

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AUTHORITY

- Elements. Pen. Code, § 470b.
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Altered Driver's License. Veh. Code, § 14610.

(New January 2006)

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(iii) Counterfeit Seal

1925. Forgery of Government, Public, or Corporate Seal

The defendant is charged [in Count ____] with (forging/ [or] counterfeiting) a (government/public/corporate) seal [or (falsely making[,]/ [or] forging[,]/ [or] counterfeiting) an impression representing a seal].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (forged/ [or] counterfeited) a seal [or (falsely made[,]/ [or] forged[,]/ [or] counterfeited) an impression representing a seal] of (this state[,] /[or] a legally authorized public officer[,] /[or] a court of record[,] /[or] a corporation[,]/ [or] a public seal legally authorized or recognized by any state, government, or country);**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant (forged[,]/ [or] counterfeited[,]/ [or] falsely made) the following items: _____ <*insert description of each seal or impression when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (forged[,]/

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[or] counterfeited[,]/ [or] falsely made) at least one of these items and you all agree on which item (he/she) (forged[,]/ [or] counterfeited[,]/ [or] falsely made).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 472.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery of Seal. Pen. Code, §§ 664, 472.

(New January 2006)

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1926. Possession of Counterfeit Government, Public, or Corporate Seal

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The defendant is charged [in Count ____] with possessing a counterfeit (government/public/corporate) seal [or an impression of a counterfeit (government/public/corporate) seal].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a counterfeit seal [or an impression of a counterfeit seal] of (this state[,]/ [or] a legally authorized public officer[,]/ [or] a court of record[,]/ [or] a corporation[,]/ [or] a public seal legally authorized or recognized by any state, government, or country);**
2. **The defendant knew that the seal [or impression of the seal] was counterfeit;**
3. **The defendant willfully concealed the fact that the seal [or impression of the seal] was counterfeit;**

AND

4. **When the defendant possessed the seal [or impression of the seal], (he/she) intended to defraud.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[Two or more people may possess something at the same time.]

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[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant possessed the following items: _____ <*insert description of each seal or impression when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple forged items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 472.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Possession of Counterfeit Seal. Pen. Code, §§ 664, 472.

(New January 2006)

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(iv) Possession With Intent to Defraud

1930. Possession of Forged Document

The defendant is charged [in Count ____] with (possessing/ [or] receiving) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) document.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/ [or] received) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) _____ <*insert type[s] of document[s] from Pen. Code, § 470(d)*>;**
2. **The defendant knew that the document was (forged[,]/ [or] altered[,]/ [or] counterfeit);**
3. **The defendant intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document as genuine;**

AND

4. **When the defendant (possessed/ [or] received) the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *(passes/* [or] *uses)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

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[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant possessed the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these documents and you all agree on which document (he/she) possessed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple forged items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 475(a).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].

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- Intent to Defraud Entity. Pen. Code, § 8.
- Pass or Attempt to Use Defined. *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 562 [155 Cal.Rptr. 89], disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

RELATED ISSUES

Possession and Uttering

The defendant cannot be convicted of possessing and uttering the same document. (*People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679 [95 Cal.Rptr. 224].)

Possession of Multiple Documents Only One Offense

Even if the defendant possessed multiple forged documents at the same time, only one violation of Penal Code section 475 may be charged. (*People v. Bowie* (1977) 72 Cal.App.3d 143, 156–157 [140 Cal.Rptr. 49] [11 checks supported 1 count, not 11].)

(New January 2006)

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1931. Possession of Blank Check: With Intent to Defraud

The defendant is charged [in Count ____] with possessing a (blank/ [or] unfinished) (check[,]/ [or] note[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] bank bill) with intent to defraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a (blank/ [or] unfinished) (check[,]/ [or] note[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] bank bill);**

AND

2. **When the defendant possessed the document, (he/she) intended to complete [or aid the completion of] the document in order to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The (check[,]/ [or] note[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] bank bill) may be real or fictitious.]

[The People allege that the defendant possessed the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these documents and you all agree on which document (he/she) possessed.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 475(b).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

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RELATED ISSUES

See the Related Issues section to CALCRIM No. 1930, *Possession of Forged Document*.

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1932. Possession of Completed Check: With Intent to Defraud

The defendant is charged [in Count ____] with possessing a completed (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order) with intent to defraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a completed (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order);**

AND

2. **When the defendant possessed the document, (he/she) intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document in order to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

A person *(passes/* [or] *uses)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[It is not necessary that anyone actually be defrauded or actually suffer a financial. legal, or property loss as a result of the defendant's acts.]

[The (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order) may be real or false.]

[The People allege that the defendant possessed the following documents: _____ <*insert description of each document when multiple items alleged*>**. You may not find the defendant guilty**

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unless you all agree that the People have proved that the defendant possessed at least one of these documents and you all agree on which document (he/she) possessed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 475(c).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [21 Cal.Rptr.2d 752]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1930, *Possession of Forged Document*.

(New January 2006)

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(v) Check Fraud

1935. Making, Passing, etc., Fictitious Check or Bill

The defendant is charged [in Count ____] with (possessing[,]/ [or] making[,]/ [or] passing[,]/ [or] using[,]/ [or] attempting to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property);**
2. **The defendant knew that the document was (false/ [or] altered);**

[AND]

3. **When the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the document, (he/she) intended to defraud(;/.)**

<Give element 4 only when possession charged.>

[AND

4. **When the defendant possessed the document, (he/she) intended to pass or use the document as genuine.]**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

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[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

A person *(passes[,]/* [or] *uses[,]/* [or] *attempts to pass or use)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[The People allege that the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) at least one document that was (fictitious/ [or] altered) and you all agree on which document (he/she) (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant passed or possessed multiple forged documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

If the prosecution alleges that the defendant possessed the document, give element 4. Do not give element 4 if the prosecution alleges that the defendant made, passed, used, or attempted to pass or use the document.

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Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 476.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Pass or Attempt to Use Defined. *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 150, 169, 173.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Making, etc., of Fictitious Check. Pen. Code, §§ 664, 476.

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RELATED ISSUES

Check Fraud

A defendant who forges the name of another on a check may be charged under either Penal Code section 470 or section 476. (*People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66]; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586 [311 P.2d 927].) However, the defendant may not be convicted of and sentenced on both charges for the same conduct. (Pen. Code, § 654; *People v. Hawkins, supra,* 196 Cal.App.2d at pp. 839–840; see also CALCRIM No. 3516, *Multiple Counts—Alternative Charges for One Event*.)

(New January 2006)

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(vi) Filing False Document

1945. Procuring Filing of False Document or Offering False Document for Filing

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The defendant is charged [in Count ____] with (offering a (false/ [or] forged) document for (filing[,]/ [or] recording[,]/ [or] registration)/having a (false/ [or] forged) document (filed[,]/ [or] recorded[,]/ [or] registered)).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—offering>

[1. The defendant offered a (false/ [or] forged) document for (filing[,]/ [or] recording[,]/ [or] registration) in a public office in California;

<Alternative 1B—procuring>

[1. The defendant caused a (false/ [or] forged) document to be (filed[,]/ [or] recorded[,]/ [or] registered) in a public office in California;

2. When the defendant did that act, (he/she) knew that the document was (false/ [or] forged);

AND

3. The document was one that, if genuine, could be legally (filed[,]/ [or] recorded[,]/ [or] registered).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 115.

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- Materiality of Alteration Not Element. *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1578–1579 [60 Cal.Rptr.2d 323].
- Meaning of Instrument as Used in Penal Code section 115. *People v. Parks* (1992) 7 Cal.App.4th 883, 886–887 [9 Cal.Rptr.2d 450]; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682–684 [165 Cal.Rptr. 222]; *People v. Powers* (2004) 117 Cal.App.4th 291, 295–297 [11 Cal.Rptr.3d 619].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 171–172.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1][b] (Matthew Bender).

RELATED ISSUES

Meaning of Instrument

Penal Code section 115 applies to any "instrument" that, "if genuine, might be filed, registered, or recorded under any law of this state or of the United States. . . ." (Pen. Code, § 115(a).) Modern cases have interpreted the term "instrument" expansively, including any type of document that is filed or recorded with a public agency that, if acted on as genuine, would have the effect of deceiving someone. (See *People v. Parks* (1992) 7 Cal.App.4th 883, 886–887 [9 CalRptr.2d 450]; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682–684 [165 Cal.Rptr. 222].) Thus, the courts have held that "instrument" includes a modified restraining order (*People v. Parks, supra,* 7 Cal.App.4th at p. 886), false bail bonds (*People v. Garcia* (1990) 224 Cal.App.3d 297, 306–307 [273 Cal.Rptr. 666]), and falsified probation work referrals (*People v. Tate* (1997) 55 Cal.App.4th 663, 667 [64 Cal.Rptr.2d 206]). In the recent case of *People v. Powers* (2004) 117 Cal.App.4th 291, 297 [11 Cal.Rptr.3d 619], the court held that fishing records were "instruments" under Penal Code section 115. The court stated that "California courts have shown reluctance to interpret section 115 so broadly that it encompasses any writing that may be filed in a public office." (*Id.* at p. 295.) The court adopted the following analysis for whether a document is an "instrument," quoting the Washington Supreme Court:

> (1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of

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> such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) the information contained in the document materially affects significant rights or duties of third persons, when this effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document.

(*Id.* at p. 297 [quoting *State v. Price* (1980) 94 Wash.2d 810, 819 [620 P.2d 994].)

Each Document Constitutes a Separate Offense

Penal Code section 115 provides that each fraudulent instrument filed or offered for filing constitutes a separate violation (subdivision (b)) and may be punished separately (subdivision (d)). "Thus, the Legislature has unmistakably authorized the imposition of separate penalties for each prohibited act even though they may be part of a continuous course of conduct and have the same objective." (*People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1800 [17 Cal.Rptr.2d 462].)

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B. ACCESS CARD FRAUD

1950. Sale or Transfer of Access Card or Account Number

The defendant is charged [in Count ____] with (selling[,]/ [or] transferring[,]/ [or] conveying) an access card.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) an access card;**
2. **The defendant did so without the consent of the cardholder or the issuer of the card;**

AND

3. **When the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) the access card, (he/she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].

A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.

[*Selling* means exchanging something for money, services, or anything of value.]

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/

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[or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) the following access cards: _____ <*insert description of each card when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) at least one of these cards and you all agree on which card (he/she) (sold[,]/ [or] transferred[,]/ [or] conveyed).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant sold or transferred multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

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Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P2d 75].)

AUTHORITY

- Elements. Pen. Code, § 484e(a).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr. 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 190–191.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

Possession of Access Card With Intent to Sell (Pen. Code, § 484e(c)) may be a lesser included offense. (But see *People v. Butler* (1996) 43 Cal.App.4th 1224, 1245–1246 [51 Cal.Rptr.2d 150].)

RELATED ISSUES

Multiple Charges Based on Single Act

Prosecution under Penal Code section 484d et seq. does not preclude simultaneous prosecution under other statutes for the same conduct. (*People v. Braz* (1997) 57 Cal.App.4th 1, 8 [66 Cal.Rptr.2d 553]; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1243–1244 [51 Cal.Rptr.2d 150].) Thus, the defendant may also be charged with such offenses as burglary (Pen. Code, § 459), forgery (Pen. Code, § 470), grand theft (Pen. Code, § 487), or telephone fraud (Pen. Code, § 502.7). (*People v. Braz, supra,* 57

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Cal.App.4th at p. 8; *People v. Butler, supra,* 43 Cal.App.4th at pp. 1243–1244.) However, Penal Code section 654 may preclude punishment for multiple offenses. (*People v. Butler, supra,* 43 Cal.App.4th at p. 1248.)

Cloned Cellular Phone

"[T]he Legislature intended that the definition of access card be broad enough to cover future technologies, the only limitation being on purely paper transactions. As the evidence disclosed here, a cloned cellular phone is a sophisticated and unlawful 'means of account access' to the account of a legitimate telephone subscriber." (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1244 [51 Cal.Rptr.2d 150].)

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1951. Acquiring or Retaining an Access Card or Account Number

The defendant is charged [in Count ____] with unlawfully (acquiring/ [or] retaining) an access card.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (acquired/ [or] retained) an access card;**
2. **The defendant did so without the consent of the cardholder or the issuer of the card;**

AND

3. **When the defendant (acquired/ [or] retained) the access card, (he/she) intended to defraud by (using it[,]/ [or] selling or transferring it to someone other than the cardholder or issuer).**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].

A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.

[*Selling* means exchanging something for money, services, or anything of value.]

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

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[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant (acquired/ [or] retained) the following access cards: _____ <*insert description of each card when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (acquired/ [or] retained) at least one of these cards and you all agree on which card (he/she) (acquired/ [or] retained).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant acquired or retained multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

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Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 484e(c).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 190–191.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

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1952. Acquiring or Retaining Account Information

The defendant is charged [in Count ____] with (acquiring/ [or] retaining) the account information of an access card.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (acquired/ [or] retained) the account information of an access card that was validly issued to someone else;**
2. **The defendant did so without the consent of the cardholder or the issuer of the card;**

AND

3. **When the defendant (acquired/ [or] retained) the account information, (he/she) intended to use that information fraudulently.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].

A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

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[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant (acquired/ [or] retained) the account information of the following access cards: _____ <*insert description of each card when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (acquired/ [or] retained) the account information of at least one of these cards and you all agree on which card's account information (he/she) (acquired/ [or] retained).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed the account information of multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

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AUTHORITY

- Elements. Pen. Code, § 484e(d).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 190–191.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

RELATED ISSUES

Acquires

"If appellant is arguing that only the person who *first* acquires this information with the requisite intent is guilty of the crime, we disagree. We interpret the crime to apply to any person who acquires that information with the intent to use it fraudulently." (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1470 [76 Cal.Rptr.2d 75].)

Includes Possession of Cancelled Card

In *People v. Molina* (2004) 120 Cal.App.4th 507, 511 [15 Cal.Rptr.3d 493], the defendant possessed a cancelled access card that had been issued to someone else. The court held that this constituted a violation of Penal Code section 484e(d). (*Id.* at pp. 514–515.) The court further held that, although the defendant's conduct also violated Penal Code section 484e(c), a misdemeanor, the defendant's right to equal protection was not violated by being prosecuted for the felony offense. (*Id.* at pp. 517–518.)

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1953. Making Counterfeit Access Card or Account Number

The defendant is charged [in Count ____] with (designing[,]/ [or] making[,]/ [or] altering[,]/ [or] embossing) a counterfeit access card.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (designed[,]/ [or] made[,]/ [or] altered[,]/ [or] embossed) a counterfeit access card;**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *counterfeit access card* is a counterfeit, fictitious, altered, or forged access card or a false representation or depiction of an access card or any part of such a card.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

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[A person *alters* an access card if he or she adds to, erases, or changes a part of the card that affects a legal, financial, or property right.]

[The People allege that the defendant (designed[,]/ [or] made[,]/ [or] altered[,]/ [or] embossed) the following counterfeit access cards: _____ <*insert description of each card when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (designed[,]/ [or] made[,]/ [or] altered[,]/ [or] embossed) at least one of these cards and you all agree on which card (he/she) (designed[,]/ [or] made[,]/ [or] altered[,]/ [or] embossed).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant made multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

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AUTHORITY

- Elements. Pen. Code, § 484f(a).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 192.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery of Access Card. Pen. Code, §§ 664, 484f.

RELATED ISSUES

See the Related Issues sections in CALCRIM No. 1900, *Forgery by False Signature*, and CALCRIM No. 1950, *Sale or Transfer of Access Card or Account Number*.

(New January 2006)

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1954. Using or Attempting to Use Counterfeit Access Card

The defendant is charged [in Count ____] with (using/ [or] attempting to use) a counterfeit access card.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (used/ [or] attempted to use) a counterfeit access card;**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *counterfeit access card* is a counterfeit, fictitious, altered, or forged access card or a false representation or depiction of an access card or any part of such a card.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/an unincorporated business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *alters* an access card if he or she adds to, erases, or changes a part of the card that affects a legal, financial, or property right.

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A person *(uses/* [or] *attempts to use)* a counterfeit access card if he or she represents to someone that the card is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[The People allege that the defendant (used/ [or] attempted to use) the following counterfeit access cards: _____ <*insert description of each card when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (used/ [or] attempted to use) at least one of these cards and you all agree on which card (he/she) (used/ [or] attempted to use).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant used multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

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Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 484f(a).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Pass or Attempt to Use Defined. *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 192.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* §§ 143.01[2][c], 143.04[1], [2] (Matthew Bender).

RELATED ISSUES

See the Related Issues sections in CALCRIM No. 1900, *Forgery by False Signature*, and CALCRIM No. 1950, *Sale or Transfer of Access Card or Account Number.*

(New January 2006)

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1955. False Signature on Access Card or Receipt

The defendant is charged [in Count ____] with forgery committed by signing a false signature on (an access card/ [or] a document authorizing payment by an access card).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant signed (someone else's name/ [or] a false name) on [an access card] [or] [a (sales slip[,]/ [or] sales draft[,]/ [or] document for the payment of money) to complete an access card transaction];**
2. **The defendant was not the cardholder and did not have the authority of the cardholder to sign that name;**
3. **The defendant knew that (he/she) did not have authority to sign that name;**

AND

4. **When the defendant signed the name, (he/she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].

A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/

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[or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged the following (access cards/ [or] documents authorizing payment by an access card): _____ <*insert description of each item when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant forged at least one of these (cards/documents) and you all agree on which (card/document) (he/she) forged.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple cards or transactions, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

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Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 484f(b).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Signature Not Authorized—Element of Offense. *People v. Hidalgo* (1933) 128 Cal.App. 703, 707 [18 P.2d 391]; *People v. Maioli* (1933) 135 Cal.App. 205, 207 [26 P.2d 871].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 192.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery of Access Card. Pen. Code, §§ 664, 484f.

RELATED ISSUES

See the Related Issues sections in CALCRIM No. 1900, *Forgery by False Signature*, and CALCRIM No. 1950, *Sale or Transfer of Access Card or Account Number.*

(New January 2006)

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1956. Use of Forged, etc., Access Card

The defendant is charged [in Count ____] with using (an access card/ [or] account information for an access card) that had [been] (altered[,]/ [or] forged[,]/ [or] expired[,]/ [or] revoked[,]/ [or] acquired or retained without permission of the cardholder or card issuer[,]/ [or] _____ <*insert other description of card obtained or retained in violation of Pen. Code, §§ 484e or 484f*>**.**

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used (an access card/ [or] account information for an access card) that had [been] (altered[,]/ [or] forged[,]/ [or] expired[,]/ [or] revoked[,]/ [or] acquired or retained without permission of the cardholder or card issuer[,]/ [or]** _____ <*insert other description of card obtained or retained in violation of Pen. Code, §§ 484e or 484f*>**;**
2. **The defendant knew that the (access card/ [or] account information) had [been] (altered[,]/ [or] forged[,]/ [or] expired[,]/ [or] revoked[,]/ [or] acquired or retained without permission of the cardholder or card issuer[,]/ [or]** _____ <*insert other description of card obtained or retained in violation of Pen. Code, §§ 484e or 484f*>**;**
3. **When the defendant used the (card/ [or] information), (he/ she) intended to obtain money, goods, services, or anything of value;**

AND

4. **When the defendant used the (card/ [or] information), (he/ she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> **is an access card.]**

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[An *expired access card* is one that shows on its face an expiration date that has passed.]

[A *revoked access card* is one that the card issuer no longer authorizes for use by the cardholder who has been given written notice of the revocation.]

[A *cardholder* is anyone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].]

[A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.]

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[A person *alters* an access card if he or she adds to, erases, or changes a part of the card that affects a legal, financial, or property right.]

[The People allege that the defendant used the following (access cards/ [or] access card account information): _____ <*insert description of each card when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant used at least one of these (cards/ [or] card's account information) and you all agree on which (card/ [or] card account information) (he/she) used.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant forged multiple cards or transactions, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

If the prosecution alleges that the card was "obtained or retained in violation of Penal Code section 484e or 484f," the court may use the phrase "acquired or retained without permission of the cardholder or card issuer," if appropriate based on the facts. (See Pen. Code, § 484e(d).) Alternatively, the court may insert an appropriate description of a card "obtained or retained in violation of Penal Code section 484e or 484f" where indicated. If the court inserts another description, the court should also give the jury an instruction explaining when a card is "obtained or retained" in violation of the applicable section, defining any necessary terms.

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 484g(a).

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- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Alteration Defined. *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 193.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* §§ 143.01[2][c], 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Use of Access Card. Pen. Code, §§ 664, 484g.

RELATED ISSUES

Revoked Access Card

To prove that the defendant used a "revoked" access card, the prosecution must prove that written notice of the revocation was sent to the cardholder. (*People v. Whight* (1995) 36 Cal.App.4th 1143, 1150 [43 Cal.Rptr.2d 163].)

See the Related Issues sections in CALCRIM No. 1900, *Forgery by False Signature*, and CALCRIM No. 1950, *Sale or Transfer of Access Card or Account Number*.

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1957. Obtaining Money, etc., by Representing Self as Holder of Access Card

The defendant is charged [in Count ____] with obtaining something of value by fraudulently representing (himself/herself) as the holder of an access card.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant obtained (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value) by representing that (he/she) was the holder of an access card;**
2. **The access card had not, in fact, been issued;**
3. **The defendant obtained (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value) without the consent of the cardholder;**

AND

4. **When the defendant obtained (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), (he/she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ <*insert description, e.g., ATM card, credit card*> is an access card.]

A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].

A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/

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[or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements. Pen. Code, § 484g(b).
- Definitions. Pen. Code, § 484d.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 193.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[2][c] (Matthew Bender).

COMMENTARY

The committee has written this instruction based on the language of the statute, Penal Code section 484g(b). However, the committee notes that the requirements of the statute appear to be internally inconsistent.

LESSER INCLUDED OFFENSES

- Attempted Use of Access Card. Pen. Code, §§ 664, 484g.

RELATED ISSUES

See the Related Issues sections in CALCRIM No. 1900, *Forgery by False Signature*, and CALCRIM No. 1950, *Sale or Transfer of Access Card or Account Number*.

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C. CHECK WITH INSUFFICIENT FUNDS

1970. Making, Using, etc., Check Knowing Funds Insufficient

The defendant is charged [in Count ____] with (making[,]/ [or] drawing[,]/ [or] delivering[,]/ [or] using[,]/ [or] attempting to use) (a/an) (check[,]/ [or] draft[,]/ [or] order) knowing that there were insufficient funds for payment of the (check[,]/ [or] draft[,]/ [or] order).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) (a/an) (check[,]/ [or] draft[,]/ [or] order) on a (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) for the payment of money;**
2. **The defendant acted (for (himself/herself)[,]/ [or] as an agent or representative of someone else[,]/ [or] as an officer of a corporation);**
3. **When the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ [or] draft[,]/ [or] order), there (were/was) insufficient (funds in/ [or] credit with) the (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) to cover full payment of the (check[,]/ [or] draft[,]/ [or] order) and all other outstanding (checks[,]/ [or] drafts[,]/ [or] orders) on that account;**
4. **The defendant knew that there (were/was) insufficient (funds/ [or] credit) available in that account;**

AND

5. **When the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ [or] draft[,]/ [or] order), (he/she) intended to defraud.**

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(A/An) *(check[,]/* [or] *draft[,]/* [or] *order)* is a written document directing a (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) to pay the indicated amount to a person named as payee or to someone designated by that person.

A person *makes or draws* (a/an) (check[,]/ [or] draft[,]/ [or] order) when he or she writes it [or causes it to be written] and signs it to authorize payment.

[*Credit*, as used here, is an arrangement or understanding with a (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) for payment of money authorized by (check[,]/ [or] draft[,]/ [or] order).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[A person *(uses/* [or] *attempts to use)* (a/an) (check[,]/ [or] draft[,]/ [or] order) if he or she represents to someone that the instrument is genuine. The representation may be made by words or conduct and may be either direct or indirect.]

[The People allege that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the following items: _____ <*insert description of each instrument when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) at least one of these items and you all agree on which item (he/she) (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use).]

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<Defense: Reasonable Expectation of Payment>

[Even if the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) (a/an) (check[,]/ draft[,]/ [or] order) knowing that there were insufficient funds for payment of the (check[,]/ draft[,]/ [or] order), the defendant did not intend to defraud if, at the time (he/she) acted, (he/she) reasonably and actually believed that the (check[,]/ draft[,]/ [or] order) would be paid by the (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) when presented for payment.

The People have the burden of proving beyond a reasonable doubt that the defendant intended to defraud. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Defendant Informed Payee About Insufficient Funds>

[If, when the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ draft[,]/ [or] order), (he/she) told the person designated to receive payment on the (check[,]/ draft[,]/ [or] order) that there were insufficient funds to allow the (check[,]/ draft[,]/ [or] order) to be paid, then the defendant is not guilty of this crime.

The People have the burden of proving beyond a reasonable doubt that when the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ draft[,]/ [or] order), (he/she) did not tell the person designated to receive payment that there were insufficient funds to allow the (check[,]/ draft[,]/ [or] order) to be paid. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant made or used multiple checks, the court has a **sua sponte** duty to instruct on

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unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the bracketed paragraph that begins with "The People allege that the defendant," inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

If the prosecution alleges that the defendant made or attempted to use, etc., more than $200 in checks, give CALCRIM No. 1971, *Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks*. If the prosecution alleges that the defendant has a prior forgery-related conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant expected the check to be paid, the court has a **sua sponte** duty to give the bracketed option headed "Defense: Reasonable Expectation of Payment." (*People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770].)

If there is sufficient evidence to raise a reasonable doubt that the defendant informed the payee that there were insufficient funds to cash the check, the court has a **sua sponte** duty to give the bracketed option headed "Defense: Defendant Informed Payee About Insufficient Funds." (*People v. Poyet* (1972) 6 Cal.3d 530, 535–537 [99 Cal.Rptr. 758, 492 P.2d 1150]; *People v. Pugh, supra,* 104 Cal.App.4th at p. 73.)

AUTHORITY

- Elements. Pen. Code, § 476a.
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].

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- Intent to Defraud Entity. Pen. Code, § 8.
- Use or Attempt to Use. *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770]; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Informed Payee About Insufficient Funds. *People v. Poyet* (1972) 6 Cal.3d 530, 535–537 [99 Cal.Rptr. 758, 492 P.2d 1150]; *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770].
- Reasonable Expectation of Payment. *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770].
- Unanimity Instruction If Multiple Documents. *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 140–147.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1], [3] (Matthew Bender).

LESSER INCLUDED OFFENSES

This offense is a misdemeanor if the total amount of the checks does not exceed $200, unless the defendant has been previously convicted of a specified theft offense. (Pen. Code, § 476(b).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the checks exceeds $200 or if the prior conviction has or has not been proved. If the jury finds that the amount did not exceed $200 or the prior conviction was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Multiple Checks Totaling Over $200—Number of Counts

Under Penal Code section 476a(b), the offense is a felony-misdemeanor if the total amount of the checks made or issued exceeds $200. In general,

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the prosecution may charge a separate count for each check. However, if the individual checks do not meet the statutory amount and the offense is charged as a felony based only on the aggregate value, the prosecution can only charge a single felony count covering all of the checks that total more than $200. (*In re Watkins* (1966) 64 Cal.2d 866, 868–869 [51 Cal.Rptr. 917, 415 P.2d 805].) If, on the other hand, the defendant is charged with felony offenses based on a prior forgery-related conviction, the prosecution may charge each check as a separate felony count. (*People v. Pettit* (1964) 230 Cal.App.2d 397, 398 [41 Cal.Rptr. 42].)

Grand Theft

A defendant who uses a check with insufficient funds to obtain property may be charged under either Penal Code section 476a or section 487, or both. (*People v. Martin* (1962) 208 Cal.App.2d 867, 876–878 [25 Cal.Rptr. 610].) However, the defendant may not be sentenced on both charges for the same conduct. (*Ibid.*; Pen. Code, § 654.)

Return of Property

Two cases have held that the defendant may present evidence that he or she returned some or all of the property in an effort to demonstrate that he or she did not originally intend to defraud. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 790 [66 Cal.Rptr. 319], disapproved on other grounds in *Rhinehart v. Minicipal Court* (1984) 35 Cal.3d 772, 780, fn. 11 [200 Cal.Rptr.916, 677 P.2d 1206]; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308 [40 Cal.Rptr. 142].) However, other cases have held that, based on the facts of the particular cases, such evidence was not admissible. (*People v. Parker* (1970) 11 Cal.App.3d 500, 510 [89 Cal.Rptr. 815] [evidence of defendant's offer to repay following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [107 Cal.Rptr. 836] [evidence of restitution not relevant where defendant falsely signed the name of another to a check knowing he had no authority to do so].) If such evidence is presented, the court may give CALCRIM No. 1862, *Return of Property Not a Defense to Theft*. (*People v. Katzman, supra,* 258 Cal.App.2d at p. 791.) In addition, in *People v. Katzman, supra,* 258 Cal.App.2d at p. 792, the court held that, on request, the defense may be entitled to a pinpoint instruction that evidence of restitution may be relevant to determining if the defendant intended to defraud. If the court concludes that such an instruction is appropriate, the court may add the following to the beginning of CALCRIM No. 1862:

> If the defendant returned or offered to return [some or all of] the property obtained, that conduct may show (he/she) did not

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intend to defraud. If you conclude that the defendant returned or offered to return [some or all of] the property, it is up to you to decide the meaning and importance of that conduct.

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1971. Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks

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If you find the defendant guilty of (making[,]/ [or] drawing[,]/ [or] delivering[,]/ [or] using[,]/ [or] attempting to use) (a/an) (check[,]/ draft[,]/ [or] order) knowing that there were insufficient funds to cover it, you must then decide whether the People have proved either of the following:

1. **That at least one (check[,]/ draft[,]/ [or] order) that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) knowing that there were insufficient funds to cover it was for more than $200;**

OR

2. **That the total value of the (checks[,]/ [or] drafts[,]/ [or] orders) charged in Count ____ that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) knowing that there were insufficient funds to cover them was more than $200.**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on the value of the checks, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with the appropriate instruction on the other elements of the offense, CALCRIM No. 1970, *Making, Using, etc., Check Knowing Funds Insufficient*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the value of the checks exceeds $200.

AUTHORITY

- Elements. Pen. Code, § 476a(b).

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 140.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[3] (Matthew Bender).

RELATED ISSUES

Multiple Checks Totaling Over $200—Number of Counts

Under Penal Code section 476a(b), the offense is a felony-misdemeanor if the total amount of the checks made or issued exceeds $200. In general, the prosecution may charge a separate count for each check. However, if the individual checks do not meet the statutory amount and the offense is charged as a felony based only on the aggregate value, the prosecution can only charge a single felony count covering all of the checks that total more than $200. (*In re Watkins* (1966) 64 Cal.2d 866, 868–869 [51 Cal.Rptr. 917, 415 P.2d 805].) If, on the other hand, the defendant is charged with felony offenses based on a prior forgery-related conviction, the prosecution may charge each separate check as a separate felony count. (*People v. Pettit* (1964) 230 Cal.App.2d 397, 398 [41 Cal.Rptr. 42].)

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D. INSURANCE FRAUD

2000. Insurance Fraud: Fraudulent Claims

The defendant is charged [in Count ____] with insurance fraud committed by fraudulent claim.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—presented fraudulent claim>

[1. The defendant (presented/ [or] caused to be presented) a false or fraudulent claim for payment for a loss or injury;]

<Alternative 1B—presented fraudulent claim for vehicle theft or damage>

[1. The defendant falsely or fraudulently claimed payment for a loss due to (theft[,]/ [or] destruction[,]/ [or] damage[,]/ [or] conversion) of (a motor vehicle[,]/ [or] a motor vehicle part[,]/ [or] contents of a motor vehicle);]

<Alternative 1C—writing to be used for fraudulent claim>

[1. The defendant (prepared[,]/ [or] made[,]/ [or] signed or subscribed) a document with the intent to (present or use it/ [or] allow it to be presented) to support a false or fraudulent claim;]

<Alternative 1D—made fraudulent claim for health-care benefits>

[1. The defendant (made/ [or] caused to be made) a false or fraudulent claim for payment of a health-care benefit;]

<Alternative 1E—submitted claim for health-care benefit not used>

[1. The defendant presented a claim for a health-care benefit that was not used by [or on behalf of] the person named in the claim;]

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<Alternative 1F—presented claim for health-care benefit undercharges>

[1. The defendant claimed payment for undercharges for health-care benefits for a specific person without presenting for reconciliation, at that same time, any known overcharges for benefits for the same person;]

2. The defendant knew that the claim was false or fraudulent;

AND

3. When the defendant did that act, (he/she) intended to defraud.

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *claims, makes, or presents a claim for payment* by requesting payment under a contract of insurance for (a/an) ((loss/ [or] injury)/health-care benefit).

[A *claim for payment of a health-care benefit* includes a claim submitted by or on behalf of the provider of a workers' compensation health benefit defined in the Labor Code.]

[*Conversion* of property means interfering with someone else's property, without authorization or justification, and depriving the owner of use and possession of the property.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant presented or caused to be presented multiple claims or made multiple documents in support of a fraudulent claim, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*Id.* at p. 275.) If the court concludes that a unanimity instruction is required, give CALCRIM No. 3500, *Unanimity*.

In element 1, give alternative 1A if the prosecution alleges a violation of Penal Code section 550(a)(1). Give alternative 1B if the prosecution alleges a violation of Penal Code section 550(a)(4). Give alternative 1C if the prosecution alleges a violation of Penal Code section 550(a)(5). Give alternative 1D if the prosecution alleges a violation of Penal Code section 550(a)(6). Give alternative 1E if the prosecution alleges a violation of Penal Code section 550(a)(7). Give alternative 1F if the prosecution alleges a violation of Penal Code section 550(a)(9).

If a violation of Penal Code section 550(a)(2) or (8) is alleged, give CALCRIM No. 2001, *Insurance Fraud: Multiple Claims*. If a violation of Penal Code section 550(a)(3) is alleged, give CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

If the defendant is charged with a felony violation of Penal Code section 550(a)(6), (7), or (9), give CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone.

Related Instructions

CALCRIM No. 2001, *Insurance Fraud: Multiple Claims*.

CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

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CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*.

AUTHORITY

- Elements. Pen. Code, § 550(a)(1), (4), (5), (6), (7) & (9).
- Intent to Defraud Element of Offense. *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026 [95 Cal.Rptr. 405]; *People v. Benson* (1962) 206 Cal.App.2d 519, 529 [23 Cal.Rptr. 908], overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2 [44 Cal.Rptr. 326, 401 P.2d 934].
- Intent to Defraud—Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.
- Unanimity Instruction. *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 185–186.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1][f] (Matthew Bender).

LESSER INCLUDED OFFENSES

Fraudulent claims for health-care benefits, under Penal Code section 550(a)(6) to (9), are misdemeanors if the total amount of the claims does not exceed $400. (Pen. Code, § 550(c)(2).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the claims exceeds $400. If the jury finds that the amount does not exceed $400, then the offense should be set at a misdemeanor.

RELATED ISSUES

Writing to Be Used for Fraudulent Claim

Penal Code section 550(a)(5) makes it a felony to "[k]nowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to

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allow it to be presented, in support of any false or fraudulent claim." "Under this section, the writing required need not be false or fraudulent as long as it is intended to be presented or used in support of any false or fraudulent claim." (*People v. Zelver* (1955) 135 Cal.App.2d 226, 235 [287 P.2d 183].) In addition, "[i]t need not be shown that defendant himself executed the false instrument if there is proof that he procured its execution or aided and abetted another in doing so." (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1376 [44 Cal.Rptr.2d 644].)

Liability of Care Provider

A doctor or other care provider who prepares false documents for a fraudulent insurance claim may be prosecuted under Penal Code section 550(a)(1) for "causing the presentation of a fraudulent claim," even though another person actually presents the claim. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1369–1370 [44 Cal.Rptr.2d 644].) Alternatively, the care provider may be prosecuted under Penal Code section 550(a)(5), discussed above. *(Ibid.)*

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2001. Insurance Fraud: Multiple Claims

The defendant is charged [in Count ____] with submitting multiple insurance claims with intent to defraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant presented two or more claims for (the same (loss/ [or] injury)/payment of the same health-care benefit) to (the same/ [or] more than one) insurer;**
2. **The defendant knew that (he/she) was submitting two or more claims for the same ((loss/ [or] injury)/health-care benefit);**

AND

3. **When the defendant presented the claims, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *presents a claim for payment* by demanding payment under a contract of insurance for (a/an) ((loss/ [or] injury)/ health-care benefit).

[A *claim for payment of a health-care benefit* includes a claim submitted by or on behalf of the provider of a workers' compensation health benefit defined in the Labor Code.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction if a violation of Penal Code section 550(a)(2) or (8) is alleged.

If the defendant is charged with a felony violation of Penal Code section 550(a)(8), give CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*, with this instruction.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone.

Related Instructions

CALCRIM No. 2000, *Insurance Fraud: Fraudulent Claims*.

CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*.

AUTHORITY

- Elements. Pen. Code, § 550(a)(2) & (8).
- Intent to Defraud Element of Offense. *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026 [95 Cal.Rptr. 405]; *People v. Benson* (1962) 206 Cal.App.2d 519, 529 [23 Cal.Rptr. 908], overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2 [44 Cal.Rptr. 326, 401 P.2d 934].
- Intent to Defraud—Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 185–186.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1][f] (Matthew Bender).

LESSER INCLUDED OFFENSES

Fraudulent claims for health-care benefits, under Penal Code section 550(a)(6) to (9), are misdemeanors if the total amount of the claims does not exceed $400. (Pen. Code, § 550(c)(2).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the claims exceeds $400. If the jury finds that the amount does not exceed $400, then the offense should be set at a misdemeanor.

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2002. Insurance Fraud: Vehicle Accident

The defendant is charged [in Count ____] with insurance fraud in connection with a vehicle accident.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant caused or participated in a vehicle accident;**
2. **The defendant knew that the purpose of the accident was to present a false or fraudulent insurance claim;**

AND

3. **When the defendant caused or participated in the accident, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *presents a claim* by demanding payment under a contract of insurance for (a/an) ((loss/ [or] injury)/health-care benefit).

[A person *causes an accident* if the accident is the direct, natural, and probable consequence of the person's action and the accident would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of an accident. An act causes an accident only if it is a substantial factor in causing the

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accident. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the accident.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction if a violation of Penal Code section 550(a)(3) is alleged.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of the accident, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of the accident, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone.

Related Instructions

CALCRIM No. 2000, *Insurance Fraud: Fraudulent Claims*.

CALCRIM No. 2001, Insurance *Fraud: Multiple Claims*.

CALCRIM No. 2003, *Insurance Fraud: Health-Care Claims—Total Value*.

AUTHORITY

- Elements. Pen. Code, § 550(a)(3).
- Intent to Defraud Element of Offense. *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026 [94 Cal.Rptr. 405]; *People v. Benson*

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(1962) 206 Cal.App.2d 519, 529 [23 Cal.Rptr. 908], overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2 [44 Cal.Rptr. 326, 401 P.2d 934].

- Intent to Defraud—Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[2][c], Ch. 143, *Crimes Against Property,* § 143.01[1][f] (Matthew Bender).

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2003. Insurance Fraud: Health-Care Claims—Total Value

If you find the defendant guilty of insurance fraud in connection with health-care claims, you must then decide whether the People have proved that the total value of the (claim[s] involved/ [or] amount at issue) was more than $400 [within a period of 12 consecutive months].

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on the total value of the claims, the court has a **sua sponte** duty to instruct on this element.

This instruction **must** be given with the appropriate instruction on the other elements of the offense, CALCRIM No. 2000, *Insurance Fraud: Fraudulent Claims*, CALCRIM No. 2001, *Insurance Fraud: Multiple Claims*, or CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the total value of the claims exceeded $400.

Give the bracketed "within a period of 12 consecutive months" if the facts show several claims filed over a period of time.

AUTHORITY

- Elements. Pen. Code, § 550(c)(2).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 186.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1][a], [f], [i] (Matthew Bender).

(New January 2006)

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2004. Insurance Fraud: Destruction of Insured Property

The defendant is charged [in Count ____] with (injuring[,]/ [or] destroying[,]/ [or] hiding[,]/ [or] abandoning[,]/ [or] disposing of) insured property with intent to defraud.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (injured[,]/ [or] destroyed[,]/ [or] hid[,]/ [or] abandoned[,]/ [or] disposed of) property that was insured against loss or damage from (theft[,]/ [or] embezzlement[,]/ [or] any casualty other than fire);**

AND

2. **When the defendant did that act, (he/she) intended to (defraud/ [or] prejudice) the insurer.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[It does not matter whether the defendant or someone else owned or possessed the property.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

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Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone.

Give the bracketed sentence that begins with "It does not matter" if there is evidence that someone else owned or possessed the property.

For arson, see the Arson series, CALCRIM No. 1500 et seq.

AUTHORITY

- Elements. Pen. Code, § 548(a).
- Intent to Defraud. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 188.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* §§ 143.01[1], 143.11[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Destruction or Disposal of Property. Pen. Code, §§ 664, 548; *People v. Splawn* (1985) 165 Cal.App.3d 553, 559 [211 Cal.Rptr. 638].

RELATED ISSUES

Disposes Of

" '[D]isposes of' in Penal Code section 548 requires a definite change of control [of the property]." (*People v. Splawn* (1985) 165 Cal.App.3d 553, 558 [211 Cal.Rptr. 638].)

(New January 2006)

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E. FALSE FINANCIAL STATEMENT

2020. False Financial Statement: Making False Statement

The defendant is charged [in Count ____] with (making/ [or] causing to be made) a false written statement about (his/her/ another person's/a corporation's) (financial condition[,]/ [or] means[,]/ [or] ability to pay).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—statement made about defendant himself/herself>

[1. The defendant (made/ [or] caused to be made) a false written statement about (his/her) (financial condition[,]/ [or] means[,]/ [or] ability to pay);]

<Alternative 1B—statement made about someone else or a corporation>

[1. The defendant (made/ [or] caused to be made) a false written statement about the (financial condition[,]/ [or] means[,]/ [or] ability to pay) of (another person/a firm or corporation (in which the defendant had an interest/ [or] for which the defendant was acting));]

2. The defendant knew that the statement was false;

3. When the defendant (made the statement/ [or] caused the statement to be made), (he/she) intended that the statement be relied on;

AND

4. The defendant (made the statement/ [or] caused the statement to be made) to obtain the (delivery of personal property[,]/ [or] payment of cash[,]/ [or] making of a loan[,]/ [or] extension of credit[,]/ [or] execution of a contract of guaranty or suretyship[,]/ [or] discount of an account receivable[,]/ [or] making, acceptance, discount, sale, or endorsement of a bill of exchange or promissory note) for ((his/her) benefit/the benefit of the (other person/ corporation)).

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[A person may (make a false statement/ [or] cause a false statement to be made) either directly or indirectly, or through his or her agent. An *agent* is someone authorized by the defendant to act for (him/her) in dealings with third parties.]

[The People allege that the defendant (made/ [or] caused to be made) the following statements: _____ <*insert description of each statement when multiple statements alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (made/ [or] caused to be made) at least one of these statements and that the statement was false. You must all agree on which false statement (he/she) (made/ [or] caused to be made).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant made multiple false statements, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 275.) If the court concludes that a unanimity instruction is required, give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

If the defendant is charged with a felony violation of Penal Code section 532a(1), give CALCRIM No. 2023, *False Financial Statement: Use of False Identifying Information*.

Give the penultimate bracketed paragraph if there is evidence that the defendant made or caused any statements to be made indirectly or through an agent.

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Related Instructions

CALCRIM No. 2021, *False Financial Statement: Obtaining Benefit*.

CALCRIM No. 2022, *False Financial Statement: Reaffirming Statement*.

CALCRIM No. 2023, *False Financial Statement: Use of False Identifying Information*.

AUTHORITY

- Elements. Pen. Code, § 532a(1).
- Agent. Civ. Code, § 2295.
- Unanimity Instruction If Multiple Items. See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 140].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

A violation of Penal Code section 532a is a misdemeanor unless the defendant used "a fictitious name, social security number, business name, or business address, or . . . falsely represent[ed] himself or herself to be another person or another business." (Pen. Code, § 532a(4).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if this allegation has or has not been proved. If the jury finds that the allegation has not been proved, then the offense should be set at a misdemeanor.

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RELATED ISSUES

Misrepresentation of Identity Insufficient

Penal Code section 532a "require[s] a false statement respecting 'financial condition, or means or ability to pay.' " (*People v. Vincent* (1993) 19 Cal.App.4th 696, 702–703 [23 Cal.Rptr.2d 714].) A statement in which the defendant misrepresents his or her identity or social security number is insufficient. *(Ibid.)*

Application for Credit Does Not Include Apartment Rental

In *People v. Maguire* (1998) 67 Cal.App.4th 1022, 1029–1030 [79 Cal.Rptr.2d 573], the court held that an application to rent an apartment containing false information was not covered by Penal Code section 532a.

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2021. False Financial Statement: Obtaining Benefit

The defendant is charged [in Count ____] with obtaining a benefit using a false written statement about (his/her/another person's/a corporation's) (financial condition[,]/ [or] means[,]/ [or] ability to pay).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—statement made about defendant himself/herself>

[1. The defendant knew that a false written statement had been made about (his/her) (financial condition[,]/ [or] means[,]/ [or] ability to pay);]

<Alternative 1B—statement made about someone else or a corporation>

[1. The defendant knew that a false written statement had been made about the (financial condition[,]/ [or] means[,]/ [or] ability to pay) of (another person/a firm or corporation (in which the defendant had an interest/ [or] for which the defendant was acting));]

AND

2. The defendant obtained, for ((his/her) benefit/the benefit of the (other person/corporation)), the (delivery of personal property[,]/ [or] payment of cash[,]/ [or] making of a loan[,]/ [or] extension of credit[,]/ [or] execution of a contract of guaranty or suretyship[,]/ [or] discount of an account receivable[,]/ [or] making, acceptance, discount, sale, or endorsement of a bill of exchange or promissory note) by using the false written statement.

[The People allege that the defendant obtained the following benefits: _____ <*insert description of each benefit when multiple benefits alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant obtained at least one of these benefits and you all agree on which benefit (he/she) obtained.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant received multiple benefits, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 275.) If the court concludes that a unanimity instruction is required, give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

If the defendant is charged with a felony violation of Penal Code section 532a(1), give CALCRIM No. 2023, *False Financial Statement: Use of False Identifying Information*.

Related Instructions

CALCRIM No. 2020, *False Financial Statement: Making False Statement*.

CALCRIM No. 2022, *False Financial Statement: Reaffirming Statement*.

CALCRIM No. 2023, *False Financial Statement: Use of False Identifying Information*.

AUTHORITY

- Elements. Pen. Code, § 532a(2).
- Unanimity Instruction If Multiple Items. See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

A violation of Penal Code section 532a is a misdemeanor unless the defendant used "a fictitious name, social security number, business name, or business address, or . . . falsely represent[ed] himself or herself to be another person or another business." (Pen. Code, § 532a(4).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if this allegation has or has not been proved. If the jury finds that the allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of the Bench Notes to CALCRIM No. 2020, *False Financial Statement: Making False Statement.*

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2022. False Financial Statement: Reaffirming Statement

The defendant is charged [in Count ____] with representing in writing that a false written statement about (his/her/another person's/a corporation's) (financial condition[,]/ [or] means[,]/ [or] ability to pay) was true.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—statement made about defendant himself/herself>

[1. The defendant knew a written statement had been made about (his/her) (financial condition[,]/ [or] means[,]/ [or] ability to pay);]

<Alternative 1B—statement made about someone else or a corporation>

[1. The defendant knew a written statement had been made about the (financial condition[,]/ [or] means[,]/ [or] ability to pay) of (another person/a firm or corporation (in which the defendant had an interest/ [or] for which the defendant was acting));]

2. After that first written statement had been made, the defendant made a second written statement representing that the contents of the first statement were true at the time of the second statement;

3. The defendant knew that the contents of the first statement were not true at the time (he/she) made the second statement;

AND

4. Based on the second statement, the defendant obtained the (delivery of personal property[,]/ [or] payment of cash[,]/ [or] making of a loan[,]/ [or] extension of credit[,]/ [or] execution of a contract of guaranty or suretyship[,]/ [or] discount of an account receivable[,]/ [or] making, acceptance, discount, sale, or endorsement of a bill of exchange or promissory note) for ((his/her) benefit/the benefit of the (other person/corporation)).

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[The People allege that the defendant represented that the following statements were true: _____ <*insert descriptions when multiple statements alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant represented that at least one of these statements was true while knowing that the statement was false. You must all agree on which false statement (he/she) represented to be true.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant represented as true multiple false statements, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275 [107 Cal.Rptr.2d 160].) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 275.) If the court concludes that a unanimity instruction is required, give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

If the defendant is charged with a felony violation of Penal Code section 532a(1), give CALCRIM No. 2023, *False Financial Statement: Use of False Identifying Information*.

Related Instructions

CALCRIM No. 2020, *False Financial Statement: Making False Statement*.

CALCRIM No. 2021, *False Financial Statement: Obtaining Benefit*.

CALCRIM No. 2023, *False Financial Statement: Use of False Identifying Information*.

AUTHORITY

- Elements. Pen. Code, § 532a(3).

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- Unanimity Instruction If Multiple Items. See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

A violation of Penal Code section 532a is a misdemeanor unless the defendant used "a fictitious name, social security number, business name, or business address, or . . . falsely represent[ed] himself or herself to be another person or another business." (Pen. Code, § 532a(4).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if this allegation has or has not been proved. If the jury finds that the allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of the Bench Notes to CALCRIM No. 2020, *False Financial Statement: Making False Statement.*

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2023. False Financial Statement: Use of False Identifying Information

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If you find the defendant guilty of ((making/ [or] causing to be made) a false written statement as charged in Count ____[,]/ [or] obtaining a benefit using a false written statement as charged in Count ____[,]/ [or] representing as true a false written statement as charged in Count ____), you must then decide whether the People have proved that the defendant used false identifying information.

<Alternative A—fictitious information>

[To prove this allegation, the People must prove that the defendant used a fictitious (name[,]/ [or] social security number[,]/ [or] business name[,]/ [or] business address).]

<Alternative B—represented self as someone else>

[To prove this allegation, the People must prove that the defendant falsely (represented that (he/she) was someone else/ [or] claimed that (he/she) represented a business when (he/she) did not).]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on using false identifying information, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with the appropriate instruction on the other elements of the offense, CALCRIM Nos. 2020 to 2022.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the defendant used false identifying information.

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Related Instructions

CALCRIM No. 2020, *False Financial Statement: Making False Statement.*

CALCRIM No. 2021, *False Financial Statement: Obtaining Benefit.*

CALCRIM No. 2022, *False Financial Statement: Reaffirming Statement.*

AUTHORITY

- Elements. Pen. Code, § 532a(4).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1] (Matthew Bender).

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F. IDENTITY THEFT

2040. Unauthorized Use of Personal Identifying Information

The defendant is charged [in Count ____] with the unauthorized use of someone else's personal identifying information.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully obtained someone else's personal identifying information;**
2. **The defendant willfully used that information for an unlawful purpose;**

AND

3. **The defendant used the information without the consent of the person whose identifying information (he/she) was using.**

Personal identifying information **includes the (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) of an individual person.**

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[As used here, the term "person" means a human being, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *unlawful purpose* includes unlawfully (obtaining/ [or] attempting to obtain) (credit[,]/ [or] goods[,]/ [or] services[,]/ [or] medical information) in the name of the other person.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In the definition of personal identifying information, give the relevant items based on the evidence presented.

AUTHORITY

- Elements. Pen. Code, § 530.5(a).
- Personal Identifying Information Defined. Pen. Code, § 530.5(b).
- Person Defined. Pen. Code, § 530.5(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 209.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1], [4][h] (Matthew Bender).

(Revised August 2006)

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VEHICLE OFFENSES

A. DUI

(i) Causing Injury

2100. Driving Under the Influence Causing Injury
2101. Driving With 0.08 Percent Blood Alcohol Causing Injury
2102–2109. Reserved for Future Use

(ii) Without Injury

2110. Driving Under the Influence
2111. Driving With 0.08 Percent Blood Alcohol
2112. Driving While Addicted to a Drug
2113. Driving With 0.05 Percent Blood Alcohol When Under 21
2114–2124. Reserved for Future Use

(iii) Prior Conviction

2125. Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions
2126. Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial
2127–2129. Reserved for Future Use

(iv) Refusal

2130. Refusal—Consciousness of Guilt
2131. Refusal—Enhancement
2132–2139. Reserved for Future Use

B. FAILURE TO PERFORM DUTY FOLLOWING ACCIDENT

(i) Death or Injury

2140. Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver
2141. Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control

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2142. Failure to Perform Duty Following Accident: Lesser Included Offense

2143–2149. Reserved for Future Use

(ii) Property Damage

2150. Failure to Perform Duty Following Accident: Property Damage—Defendant Driver

2151. Failure to Perform Duty Following Accident: Property Damage—Defendant Nondriving Owner or Passenger in Control

2152–2159. Reserved for Future Use

(iii) Enhancement

2160. Fleeing the Scene Following Accident: Enhancement for Vehicular Manslaughter

2161–2179. Reserved for Future Use

C. EVADING

2180. Evading Peace Officer: Death or Serious Bodily Injury

2181. Evading Peace Officer: Reckless Driving

2182. Evading Peace Officer: Misdemeanor

2183–2199. Reserved for Future Use

D. RECKLESS DRIVING AND SPEED CONTEST

2200. Reckless Driving

2201. Speed Contest

2202. Exhibition of Speed

2203–2219. Reserved for Future Use

E. LICENSING OFFENSES

2220. Driving With Suspended or Revoked License

2221. Driving Without a License

2222. Failing to Present Driver's License

2223–2239. Reserved for Future Use

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F. OTHER VEHICLE OFFENSES

2240. Failure to Appear
2241. Driver and Driving Defined
2242–2299. Reserved for Future Use

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A. DUI

(i) Causing Injury

2100. Driving Under the Influence Causing Injury

The defendant is charged [in Count ____] with causing injury to another person while driving under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**
2. **When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug];**
3. **While driving under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or

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muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: _____ <*list name[s] of offense[s]*>.

To decide whether the defendant committed _____ <*list name[s] of offense[s]*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ <*insert other duty or duties alleged*>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to

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exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to

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instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 604.) If any evidence has been introduced to

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support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is evidence that the defendant's blood alcohol level was below 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

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If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125*, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(a); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].

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- Alcoholic Beverage Defined. Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined. Veh. Code, § 312.
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

"[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyass* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term " 'any act forbidden by law' . . . refers to acts forbidden by the Vehicle Code . . . ." (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed "when" defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyass, supra,* 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

"In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving." (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254

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Cal.Rptr. 531, 765 P.2d 493].) However, when "a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident." (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

(New January 2006)

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2101. Driving With 0.08 Percent Blood Alcohol Causing Injury

The defendant is charged [in Count ____] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**
2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;**
3. **When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: _____ <*list name[s] of offense[s]*>.

To decide whether the defendant committed _____ <*list name[s] of offense[s]*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty

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to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ <*insert other duty or duties alleged*>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless

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error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is evidence that the defendant's blood alcohol level was below 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated

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trial, give CALCRIM No. 2110, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2100, *Driving Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 149, 673 P.2d 732].
- Partition Ratio. Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7(2); Restatement Second of Torts, § 282.

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- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Statute Constitutional. *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving Under the Influence Causing Injury.*

(Revised August 2006)

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(ii) Without Injury

2110. Driving Under the Influence

The defendant is charged [in Count ____] with driving under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or

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muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08*

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Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 604.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is evidence that the defendant's blood alcohol level was below 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol.

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(*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23152(a).
- Alcoholic Beverage Defined. Veh. Code, § 109; Bus. & Prof. Code, § 23004.
- Drug Defined. Veh. Code, § 312.
- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

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- Under the Influence Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Manner of Driving. *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [252 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [252 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

- Attempted Driving Under the Influence. Pen. Code, § 664; Veh. Code, § 23152(a); *People v. Garcia* (1989) 214 Cal.App.3d Supp.1, 3–4 [262 Cal.Rptr. 915].

RELATED ISSUES

Driving

"[S]ection 23152 requires proof of volitional movement of a vehicle." (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453

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[214 Cal.Rptr. 249].) Further, driving may be established through circumstantial evidence. (*Mercer, supra,* 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540] [sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running].) See CALCRIM No. 2241, *Driver and Driving Defined.*

PAS Test Results

The results of a preliminary alcohol screening (PAS) test "are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator . . . ." (*People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203].)

Presumption Arising From Test Results—Timing

Unlike the statute on driving with a blood alcohol level of 0.08 percent or more, the statute permitting the jury to presume that the defendant was under the influence if he or she had a blood alcohol level of 0.08 percent or more does not contain a time limit for administering the test. (Veh. Code, § 23610; *People v. Schrieber* (1975) 45 Cal.App.3d 917, 922 [119 Cal.Rptr. 812].) However, the court in *Schrieber, supra,* noted that the mandatory testing statute provides that "the test must be incidental to both the offense and to the arrest and . . . no substantial time [should] elapse . . . between the offense and the arrest." (*Id.* at p. 921.)

(New January 2006)

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2111. Driving With 0.08 Percent Blood Alcohol

The defendant is charged [in Count ____] with driving with a blood alcohol level of 0.08 percent or more.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If

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the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is evidence that the defendant's blood alcohol level was below 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined.*

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Related Instructions

CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio. Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Statute Constitutional. *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

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RELATED ISSUES

Partition Ratio

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893 [35 Cal.Rptr.2d 613, 884 P.2d 70].)

See the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

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2112. Driving While Addicted to a Drug

The defendant is charged [in Count ____] with driving while addicted to a drug.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant was addicted to a drug.**

A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.

A person is *addicted* to a drug if he or she:

1. **Has become physically dependent on the drug, suffering withdrawal symptoms if he or she is deprived of it;**
2. **Has developed a tolerance to the drug's effects and therefore requires larger and more potent doses;**

AND

3. **Has become emotionally dependent on the drug, experiencing a compulsive need to continue its use.**

[It is not a defense that the defendant was legally entitled to use the drug.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor a felony based on prior convictions.

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If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

Vehicle Code section 23630 states that the fact that the defendant was legally entitled to use the drug is not a defense to a charge of driving under the influence. (Veh. Code, § 23630.) It is unclear whether this provision applies to the charge of driving while addicted. If the court concludes that the statute does apply, the court may add the bracketed sentence at the end of the instruction: "It is not a defense that the defendant was legally entitled to use the drug."

In addition, Vehicle Code section 23152(c) states "[t]his subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code." If there is evidence that the defendant is participating in an approved treatment program, the court has a **sua sponte** duty to instruct on this defense.

On request, give CALCRIM No. 2241, *Driver and Driving Defined.*

Related Instructions

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.*

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.*

AUTHORITY

- Elements. Veh. Code, § 23152(c).

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- Drug Defined. Veh. Code, § 312.
- Addict Defined. *People v. O'Neil* (1965) 62 Cal.2d 748, 754 [44 Cal.Rptr. 320, 401 P.2d 928].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][a] (Matthew Bender).

(New January 2006)

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2113. Driving With 0.05 Percent Blood Alcohol When Under 21

The defendant is charged [in Count ____] with driving when under the age of 21 years with a blood alcohol level of 0.05 percent or more.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**
2. **When (he/she) drove, the defendant's blood alcohol level was 0.05 percent or more by weight;**

AND

3. **At that time, the defendant was under 21 years old.**

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Note that this offense is an infraction. (Veh. Code, §§ 40000.1, 40000.15.) However, this instruction has been included because this offense may serve as a predicate offense for gross vehicular manslaughter while intoxicated or vehicular manslaughter while intoxicated. (Pen. Code, §§ 191.5, 192(c)(3); see *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276 [82 Cal.Rptr.2d 558].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567

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[131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, § 23140(a); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Statute Constitutional. See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732]; *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276 [82 Cal.Rptr.2d 558].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1A][a] (Matthew Bender).

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

(New January 2006)

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(iii) Prior Conviction

2125. Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions

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If you find the defendant guilty of ([causing injury while] driving under the influence/ [or] [causing injury while] driving with a blood alcohol level of 0.08 percent or more), [or the lesser offense of driving under the influence [or driving with a blood alcohol level of 0.08 percent or more]], you must then determine whether the People have proved the additional allegation that the defendant has been convicted of (another/other) driving under the influence offense[s] before. It has already been determined that the defendant is the person named in exhibits _____ <*insert numbers or descriptions of exhibits*>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <*insert Veh. Code section violated*>**, on** _____ <*insert date of conviction*>**, in the** _____ <*insert name of court*>**, in Case Number** _____ <*insert docket or case number*>**(;/.)**

[AND <*Repeat for each prior conviction alleged*>**.]**

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing credibility of the defendant*>**]. Do not consider this evidence for any other purpose.]**

[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions. Give this instruction if the defendant does not admit the prior conviction and the court has not granted a bifurcated trial on the prior conviction.

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. See the Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, for an extensive discussion of bifurcation.

This instruction **must** be given with the appropriate instruction defining the elements of the driving under the influence offense charged, CALCRIM Nos. 2100, 2101, 2110, 2111.

On request, the court should give the bracketed limiting instruction regarding the evidence of the prior convictions. (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction and the defense may prefer that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have or have not been proved.

AUTHORITY

- Elements. Veh. Code, §§ 23550, 23550.5 & 23566.
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

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- Judge Determines if Defendant Person Named in Documents. Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 222–225.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3][d] (Matthew Bender).

RELATED ISSUES

Ten-Year "Washout" Period

Effective January 1, 2005, prior convictions for driving under the influence within ten years of the current offense may be used for enhancement purposes. (See Veh. Code, §§ 23550, 23550.5 & 23566.)

Order of Convictions, Not Offenses Relevant

In order for the sentencing enhancements for multiple driving under the influence offenses to apply, the conviction for the other offense or offenses must predate the current offense. (*People v. Snook* (1997) 16 Cal.4th 1210, 1216 [69 Cal.Rptr.2d 615, 947 P.2d 808].) The date on which the other offenses occurred is not relevant. *(Ibid.)*

All Offenses Must Occur Within Time Period

"[F]or a fourth DUI offense to be charged as a felony, the offense must be committed within [. . . ten] years of three or more separate DUI violations resulting in convictions, and all four must occur within a period of [. . . ten] years." (*People v. Munoz* (2002) 102 Cal.App.4th 12, 20 [125 Cal.Rptr.2d 182].)

Prior Felony Reduced to Misdemeanor

In *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1389 [101 Cal.Rptr.2d 618], the defendant had been previously convicted of a felony driving under the influence offense. After successful completion of probation, that felony was reduced to a misdemeanor under Penal Code section 17(b).

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(Ibid.) The court held that that conviction could not later be used as a prior *felony* conviction to enhance the defendant's sentence. *(Ibid.)*

See also the Related Issues section and Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

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2126. Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial

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The People have alleged that the defendant was previously convicted of (another/other) driving under the influence offense[s]. It has already been determined that the defendant is the person named in exhibits _____ <*insert numbers or descriptions of exhibits*>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <*insert Veh. Code section violated*>, on _____ <*insert date of conviction*>, in the _____ <*insert name of court*>, in Case Number _____ <*insert docket or case number*>(;/.)

[AND <*Repeat for each prior conviction alleged*>**.]**

[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions. Give this instruction if the court has granted a bifurcated trial. The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

Give the bracketed paragraph that begins with "In deciding whether the People have proved" on request.

The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. (Pen. Code, § 1158.)

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AUTHORITY

- Elements. Veh. Code, §§ 23550, 23550.5 & 23566.
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].
- Bifurcation. *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines if Defendant Person Named in Documents. Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 222–225.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3][d] (Matthew Bender).

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*, and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

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(iv) Refusal

2130. Refusal—Consciousness of Guilt

The law requires that any driver who has been lawfully arrested submit to a chemical test at the request of a peace officer who has reasonable cause to believe that the person arrested was driving under the influence.

If the defendant refused to submit to such a test after a peace officer asked (him/her) to do so and explained the test's nature to the defendant, then the defendant's conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant refused to submit to such a test, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to submit to such a test cannot prove guilt by itself.

BENCH NOTES

Instructional Duty

The court may instruct the jury that refusal to submit to a chemical analysis for blood alcohol content may demonstrate consciousness of guilt. (*People v. Sudduth* (1966) 65 Cal.2d 543, 547 [55 Cal.Rptr. 393, 421 P.2d 401].) There is no sua sponte duty to give this instruction.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether this instruction is appropriate and/or whether the jury should be

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instructed on these additional issues. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

AUTHORITY

- Implied Consent Statute. Veh. Code, § 23612.
- Instruction Constitutional. *People v. Sudduth* (1966) 65 Cal.2d 543, 547 [55 Cal.Rptr. 393, 421 P.2d 401].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[2][f] (Matthew Bender).

RELATED ISSUES

Silence

Silence in response to repeated requests to submit to a chemical analysis constitutes a refusal. (*Lampman v. Dept. of Motor Vehicles* (1972) 28 Cal.App.3d 922, 926 [105 Cal.Rptr. 101].)

Inability to Complete Chosen Test

If the defendant selects one test but is physically unable to complete that test, the defendant's refusal to submit to an alternative test constitutes a refusal. (*Cahall v. Dept. of Motor Vehicles* (1971) 16 Cal.App.3d 491, 496 [94 Cal.Rptr. 182]; *Kessler v. Dept. of Motor Vehicles* (1992) 9 Cal.App.4th 1134, 1139 [12 Cal.Rptr.2d 46].)

Conditions Placed on Test by Defendant

"It is established that a *conditional* consent to a test constitutes a refusal to submit to a test within the meaning of section 13353." (*Webb v. Miller* (1986) 187 Cal.App.3d 619, 626 [232 Cal.Rptr. 50] [request by defendant to see chart in wallet constituted refusal, italics in original]; *Covington v. Dept. of Motor Vehicles* (1980) 102 Cal.App.3d 54, 57 [162 Cal.Rptr. 150] [defendant's response that he would only take test with attorney present constituted refusal].) However, in *Ross v. Dept. of Motor Vehicles* (1990) 219 Cal.App.3d 398, 402–403 [268 Cal.Rptr. 102], the court held that the

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defendant was entitled under the implied consent statute to request to see the identification of the person drawing his blood. The court found the request reasonable in light of the risks of HIV infection from improper needle use. (*Id.* at p. 403.) Thus, the defendant could not be penalized for refusing to submit to the test when the technician declined to produce identification. *(Ibid.)*

Defendant Consents After Initial Refusal

"Once the driver refuses to take any one of the three chemical tests, the law does not require that he later be given one when he decides, for whatever reason, that he is ready to submit. [Citations.] [¶] . . . Simply stated, one offer plus one rejection equals one refusal; and, one suspension." (*Dunlap v. Dept. of Motor Vehicles* (1984) 156 Cal.App.3d 279, 283 [202 Cal.Rptr. 729].)

Defendant Refuses Request for Urine Sample Following Breath Test

In *People v. Roach* (1980) 108 Cal.App.3d 891, 893 [166 Cal.Rptr. 801], the defendant submitted to a breath test revealing a blood alcohol level of 0.08 percent. The officer then asked the defendant to submit to a urine test in order to detect the presence of drugs, but the defendant refused. *(Ibid.)* The court held that this was a refusal under the implied consent statute. *(Ibid.)*

Sample Taken by Force After Refusal

"[T]here was no voluntary submission on the part of respondent to any of the blood alcohol tests offered by the arresting officer. The fact that a blood sample ultimately was obtained and the test completed is of no significance." (*Cole v. Dept. of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875 [189 Cal.Rptr. 249].)

Refusal Admissible Even If Faulty Admonition

Vehicle Code section 23612 requires a specific admonition to the defendant regarding the consequences of refusal to submit to a chemical test. If the officer fails to properly advise the defendant in the terms required by statute, the defendant may not be subject to the mandatory license suspension or the enhancement for willful refusal to complete a test. (See *People v. Brannon* (1973) 32 Cal.App.3d 971, 978 [108 Cal.Rptr. 620]; *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 118 [186 Cal.Rptr. 716].) However, the refusal is still admissible in criminal proceedings for driving under the influence. (*People v. Municipal Court*

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(Gonzales), supra, 137 Cal.App.3d at p. 118.) Thus, the court in *People v. Municipal Court (Gonzales), supra,* 137 Cal.App.3d at p. 118, held that the defendant's refusal was admissible despite the officer's failure to advise the defendant that refusal would be used against him in a court of law, an advisement specifically required by the statute. (See Veh. Code, § 23612(a)(4).)

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2131. Refusal—Enhancement

If you find the defendant guilty of (causing injury while driving under the influence/ [or] [the lesser offense of] driving under the influence), you must then decide whether the People have proved the additional allegation that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).

To prove this allegation, the People must prove that:

1. **A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug);**
2. **The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test;**

AND

3. **The defendant willfully refused to (submit to a test/ [or] to complete the test).**

To have *fully advised the defendant*, the peace officer must have told (him/her) all of the following information:

1. **(He/She) may choose a blood(,/ or) breath[, or urine] test; [if (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug;] [if only one test is available, (he/she) must complete the test available;] [if (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test;]**
2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test;**
3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court;**
4. **Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of**

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driving under the influence or with a blood alcohol level of 0.08 percent or more;

AND

5. Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.

<Short Alternative; see Bench Notes>

[(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]

<Long Alternative; see Bench Notes>

[A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous (seven/ten) years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous (seven/ten) years;

AND

B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous (seven/ten) years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions, suspensions, or revocations, on separate occasions, within the previous (seven/ten) years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or

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more. Vehicle Code section 23152 prohibits driving under the influence of alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A person employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the enhancement.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

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The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, give bracketed element 4. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of "fully advised" **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two-and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate. The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

When giving the long version, give the option of "ten years" for the time period in which the prior conviction may be used, unless the court determines that the law prior to January 1, 2005 is applicable. In such case, the court must select the "seven year" time period.

The jury must determine whether the witness is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the witness was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the witness is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

AUTHORITY

- Elements. Veh. Code, §§ 23577 & 23612.

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- Statute Constitutional. *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369 [237 Cal.Rptr. 397].
- Statutory Admonitions Not Inherently Confusing or Misleading. *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142 [244 Cal.Rptr. 624].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[4][a], [b] (Matthew Bender).

RELATED ISSUES

Admonition Must Convey Strong Likelihood of Suspension

It is insufficient for the officer to advise the defendant that his or her license "could" be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906 [101 Cal.Rptr. 387, 495 P.2d 1307]; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907 [93 Cal.Rptr. 613].) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra,* 6 Cal.3d at p. 906; *Giomi, supra,* 15 Cal.App.3d at p. 907.)

Admonition Must Be Clearly Conveyed

"[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver." (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363 [165 Cal.Rptr. 626].) Thus, in *Thompson, supra,* 107 Cal.App.3d at p. 363, the court set aside the defendant's license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant's own "obstreperous conduct . . . prevented the officer from completing the admonition," or where the defendant's own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744 [188 Cal.Rptr. 126]; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792 [71 Cal.Rptr. 123].)

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Defendant Incapable of Understanding Due to Injury or Illness

Where the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d 752, 760 [1 Cal.Rptr.2d 115].) Thus, in *Hughey, supra,* 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662 [119 Cal.Rptr. 804], the court upheld the license suspension where defendant's use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant's illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. *(Ibid.)*

See the Related Issues section in CALCRIM No. 2130, *Refusal—Consciousness of Guilt*.

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B. FAILURE TO PERFORM DUTY FOLLOWING ACCIDENT

(i) Death or Injury

2140. Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver

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The defendant is charged [in Count ____] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **While driving, the defendant was involved in a vehicle accident;**
2. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**
3. **The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

4. **The defendant willfully failed to perform one or more of the following duties:**
   - **(a) To stop immediately at the scene of the accident;**
   - **(b) To provide reasonable assistance to any person injured in the accident;**
   - **(c) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident all of the following information:**
     - **The defendant's name and current residence address;**

     [AND]

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- **The registration number of the vehicle (he/she) was driving(;/.)**

<Give following sentence if defendant not owner of vehicle.>

[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>

[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident.]**

[AND]

(d) When requested, to show (his/her) driver's license to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident(;/.)

<Give element 4(e) if accident caused death.>

[AND

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a

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reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The driver is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The driver of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in a vehicle accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

[When providing his or her name and address, the driver is required to identify himself or herself as the driver of a vehicle involved in the accident.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (death/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it

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is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant drove the vehicle. If the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control of the vehicle, give CALCRIM No. 2141, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control.*

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death or injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death or injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death"

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and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 4(e) only if the accident caused a death.

Give the bracketed portion that begins with "The driver is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section below.)

Give the bracketed paragraph defining "involved in a vehicle accident" if that is an issue in the case.

Give the bracketed paragraph stating that "the driver is required to identify himself or herself as the driver" if there is evidence that the defendant stopped and identified himself or herself but not in a way that made it apparent to the other parties that the defendant was the driver. (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury. Veh. Code, § 20001(b)(2).
- Sentence for Injury. Veh. Code, § 20001(b)(1).
- Knowledge of Accident and Injury. *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident. *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].

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- Immediately Stopped Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance. *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].
- Permanent, Serious Injury Defined. Veh. Code, § 20001(d).
- Statute Does Not Violate Fifth Amendment Privilege. *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Must Identify Self as Driver. *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].
- Unanimity Instruction Required. *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene. *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property. *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle. *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.60[2][b][ii], 91.81[1][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3A][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury. Veh. Code, § 20001(b)(1).
- Misdemeanor Failure to Stop Following Accident—Property Damage. Veh. Code, § 20002; *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

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RELATED ISSUES

Constructive Knowledge of Injury

"[K]nowledge may be imputed to the driver of a vehicle where the fact of personal injury is visible and obvious or where the seriousness of the collision would lead a reasonable person to assume there must have been resulting injuries." (*People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207] [citations omitted].)

Reasonable Assistance

Failure to render reasonable assistance to an injured person constitutes a violation of the statute. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].) "In this connection it must be noted that the statute requires that *necessary* assistance be rendered." (*People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914] [emphasis in original].) In *People v. Scofield, supra,* the court held that where other people were caring for the injured person, the defendant's "assistance was not *necessary*." (*Id.* at p. 709 [emphasis in original].) An instruction limited to the statutory language on rendering assistance "is inappropriate where such assistance by the driver is unnecessary, as in the case where paramedics have responded within moments following the accident." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].) However, "the driver's duty to render necessary assistance under Vehicle Code section 20003, at a minimum, requires that the driver first ascertain what assistance, if any, the injured person needs, and then the driver must make a reasonable effort to see that such assistance is provided, whether through himself or third parties." *(Ibid.)* The presence of bystanders who offer assistance is not alone sufficient to relieve the defendant of the duty to render aid. *(Ibid.)* "[T]he 'reasonable assistance' referred to in the statute might be the summoning of aid," rather than the direct provision of first aid by the defendant. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].)

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2141. Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control

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The defendant is charged [in Count ____] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [owned and] was riding as a passenger in a vehicle involved in an accident;**
2. **At the time of the accident, the defendant had full authority to direct and control the vehicle even though another person was driving the vehicle;**
3. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**
4. **The defendant knew that the vehicle had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

5. **The defendant willfully failed to perform one or more of the following duties:**

(a) To cause the driver of the vehicle to stop immediately at the scene of the accident;

(b) When requested, to show (his/her) driver's license, or any other available identification, to (the person struck/ the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident;

(c) To provide reasonable assistance to any person injured in the accident;

[OR]

(d) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at

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the scene of the accident all of the following information:

- **The defendant's name and current residence address;**
- **The registration number of the vehicle (he/she) (owned/ was a passenger in);**

[AND]

- **The name and current residence address of the driver of the vehicle(;/.)**

<Give following sentence if defendant not owner of vehicle.>

[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>

[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident(;/.)]**

<Give element 5(e) if accident caused death.>

[OR

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the (owner/passenger in control) must cause the vehicle he or she is a passenger in to stop as soon as reasonably possible under the circumstances.

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To *provide reasonable assistance* means the (owner/passenger in control) must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the (owner/passenger in control) or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The (owner/passenger in control) is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the requirement that the (owner/passenger in control) provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The (owner/passenger in control) of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the vehicle to collide with another vehicle or person.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (death/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it

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is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

[If the defendant told the driver to stop and made a reasonable effort to stop the vehicle, but the driver refused, then the defendant is not guilty of this crime.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that the defendant drove the vehicle, give CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver.*

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death or injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death or injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing

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death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death" and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 5(e) only if the accident caused a death.

Give the bracketed portion that begins with "The (owner/passenger in control) is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section of CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.)

Give the bracketed paragraph defining "involved in an accident" if that is an issue in the case.

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

Give the bracketed paragraph that begins with "If the defendant told the driver to stop" if there is sufficient evidence that the defendant attempted to cause the vehicle to be stopped.

AUTHORITY

- Elements. Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury. Veh. Code, § 20001(b)(2).
- Knowledge of Accident and Injury. *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident. *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].

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- Immediately Stopped Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance. *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].
- Permanent, Serious Injury Defined. Veh. Code, § 20001(d).
- Nondriving Owner. *People v. Rallo* (1931) 119 Cal.App. 393, 397 [6 P.2d 516].
- Statute Does Not Violate Fifth Amendment Privilege. *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Unanimity Instruction Required. *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene. *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property. *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle. *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury. Veh. Code, § 20001(b)(1).
- Misdemeanor Failure to Stop Following Accident—Property Damage. Veh. Code, § 20002; *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

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2142. Failure to Perform Duty Following Accident: Lesser Included Offense

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The crime[s] of (failing to perform a legal duty following a vehicle accident that caused injury/ [and] failing to perform a legal duty following a vehicle accident that caused property damage) (is a/are) lesser crime[s] than failing to perform a legal duty following a vehicle accident that caused (death/ [or] permanent, serious injury).

The People have the burden of proving beyond a reasonable doubt that the defendant committed the crime of failing to perform a legal duty following a vehicle accident that caused (death/ [or] permanent, serious injury) rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of failing to perform a legal duty following a vehicle accident that caused (death/ [or] permanent, serious injury). You must consider whether the defendant is guilty of the lesser crime[s] of [failing to perform a legal duty following a vehicle accident that caused injury] [or] [failing to perform a legal duty following a vehicle accident that caused property damage].

BENCH NOTES

Instructional Duty

Give this instruction when: (1) the defendant is charged with leaving the scene of an accident resulting in death or permanent, serious injury and the court is instructing on the lesser offense of leaving the scene of an accident resulting in injury, and/or leaving the scene of an accident resulting in property damage; or (2) when the defendant is charged with leaving the scene of an accident resulting in injury and the court is instructing on the lesser offense of leaving the scene of an accident resulting in property damage.

AUTHORITY

- Elements. Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury. Veh. Code, § 20001(b)(2).

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- Sentence for Injury. Veh. Code, § 20001(b)(1).
- Permanent, Serious Injury Defined. Veh. Code, § 20001(d).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

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(ii) Property Damage

2150. Failure to Perform Duty Following Accident: Property Damage—Defendant Driver

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The defendant is charged [in Count ____] with failing to perform a legal duty following a vehicle accident that caused property damage.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **While driving, the defendant was involved in a vehicle accident;**
2. **The accident caused damage to someone else's property;**
3. **The defendant knew that (he/she) had been involved in an accident that caused property damage [or knew from the nature of the accident that it was probable that property had been damaged];**

AND

4. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To stop immediately at the scene of the accident;

   OR

   (b) To provide the owner or person in control of the damaged property with (his/her) name and current residence address [and the name and address of the owner of the vehicle the defendant was driving].

The driver of a vehicle may provide the required information in one of two ways:

1. **The driver may locate the owner or person in control of the damaged property and give that person the information directly. On request, the driver must also show that person his or her driver's license and the vehicle registration;**

OR

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2. The driver may leave the required information in a written note in a conspicuous place on the vehicle or other damaged property. The driver must then also, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

The driver of a vehicle must perform the duties listed regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in a vehicle accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

[When providing his or her name and address, the driver is required to identify himself or herself as the driver of a vehicle involved in the accident.]

[The property damaged may include any vehicle other than the one allegedly driven by the defendant.]

[An accident causes property damage if the property damage is the direct, natural, and probable consequence of the accident and the damage would not have happened without the accident. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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[There may be more than one cause of property damage. An accident causes property damage only if it is a substantial factor in causing the damage. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the property damage.]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant drove the vehicle. If the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control of the vehicle, give CALCRIM No. 2151, *Failure to Perform Duty Following Accident: Property Damage—Defendant Nondriving Owner or Passenger in Control.*

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of property damage, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of property damage, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed paragraph defining "involved in a vehicle accident," if that is an issue in the case.

Give the bracketed paragraph stating that "the driver is required to identify himself or herself as the driver" if there is evidence that the defendant stopped and identified himself or herself but not in a way that made it

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apparent to the other parties that the defendant was the driver. (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

Give the bracketed sentence that begins with "The property damaged may include" if the evidence shows that the accident may have damaged only the defendant's vehicle.

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

On request, give CALCRIM No. 2241, *Driver and Driving Defined.*

AUTHORITY

- Elements. Veh. Code, § 20002; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10 [43 Cal.Rptr.2d 681, 899 P.2d 67].
- Knowledge of Accident. *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10 [43 Cal.Rptr.2d 681, 899 P.2d 67].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident. *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Statute Does Not Violate Fifth Amendment Privilege. *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Must Identify Self as Driver. *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].
- Unanimity Instruction Required. *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene. *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property. *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

(New January 2006)

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2151. Failure to Perform Duty Following Accident: Property Damage—Defendant Nondriving Owner or Passenger in Control

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The defendant is charged [in Count ____] with failing to perform a legal duty following a vehicle accident that caused property damage.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [owned and] was riding as a passenger in a vehicle involved in an accident;**
2. **At the time of the accident, the defendant had full authority to direct and control the vehicle even though another person was driving;**
3. **The accident caused damage to someone else's property;**
4. **The defendant knew that (he/she) had been involved in an accident that caused property damage [or knew from the nature of the accident that it was probable that property had been damaged];**

AND

5. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To cause the vehicle to stop immediately at the scene of the accident;

   OR

   (b) To provide the owner or person in control of the damaged property with (his/her) name and current residence address [and the name and address of the driver of the vehicle the defendant [owned and] was a passenger in].

The (owner/passenger in control) may provide the required information in one of two ways:

1. **He or she may locate the owner or person in control of the damaged property and give that person the required information directly. On request, he or she must also show**

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that person his or her driver's license, or any other available identification, and the vehicle registration;

OR

2. He or she may leave the required information in a written note in a conspicuous place on the vehicle or other damaged property. He or she must then also, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the (owner/passenger in control) must cause the vehicle he or she is a passenger in to stop as soon as reasonably possible under the circumstances.

The (owner/passenger in control) of a vehicle must perform the duties listed regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the vehicle to collide with another vehicle or person.]

[The property damaged may include any vehicle other than the one the defendant allegedly (owned/was a passenger in).]

[An accident causes property damage if the property damage is the direct, natural, and probable consequence of the accident and the damage would not have happened without the accident. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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[There may be more than one cause of property damage. An accident causes damage only if it is a substantial factor in causing the damage. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the property damage.]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

[If the defendant told the driver to stop and made a reasonable effort to stop the vehicle, but the driver refused, then the defendant is not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that that the defendant drove the vehicle, give CALCRIM No. 2150, *Failure to Perform Duty Following Accident: Property Damage—Defendant Driver.*

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of property damage, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of property damage, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed paragraph defining "involved in an accident," if that is an issue in the case.

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Give the bracketed sentence that begins with "The property damaged may include" if the evidence shows that the accident may have damaged only the defendant's vehicle.

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

Give the bracketed paragraph that begins with "If the defendant told the driver to stop" if there is sufficient evidence that the defendant attempted to cause the vehicle to be stopped.

AUTHORITY

- Elements. Veh. Code, § 20002; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10 [43 Cal.Rptr.2d 681, 899 P.2d 67].
- Knowledge of Accident. *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10 [43 Cal.Rptr.2d 681, 899 P.2d 67].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident. *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Nondriving Owner. *People v. Rallo* (1931) 119 Cal.App. 393, 397 [6 P.2d 516].
- Statute Does Not Violate Fifth Amendment Privilege. *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Unanimity Instruction Required. *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene. *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property. *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

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(iii) Enhancement

2160. Fleeing the Scene Following Accident: Enhancement for Vehicular Manslaughter

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If you find the defendant guilty of vehicular manslaughter [as a felony] [under Count ____], you must then decide whether the People have proved the additional allegation that the defendant fled the scene of the accident after committing vehicular manslaughter.

To prove this allegation, the People must prove that:

1. **The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

2. **The defendant willfully failed to stop immediately at the scene of the accident.**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged with an enhancement under Vehicle Code section 20001(c). This enhancement only applies to felony vehicular manslaughter convictions (Pen. Code, §§ 191.5, 192(c)(1) & (3), and 192.5(a) & (c)) and must be pleaded and proved. (Veh. Code, § 20001(c).) Give the bracketed "felony" in the introductory paragraph if the jury is also being instructed on misdemeanor vehicular manslaughter.

Give the bracketed paragraph defining "involved in an accident" if that is an issue in the case.

The court must determine whether to apply this enhancement only to individuals who personally commit the vehicular manslaughter. A depublished case would have precluded giving this instruction if the People allege that the defendant aided and abetted but did not personally commit the manslaughter. (*People v. Calhoun* (2004) 123 Cal.App.4th 1031, 1044. REVIEW GRANTED and DEPUBLISHED, Nov. 2, 2004, D042645 [24 Cal.Rptr.3d 865, 106 P.3d 304].)

AUTHORITY

- Enhancement. Veh. Code, § 20001(c).
- Knowledge of Accident and Injury. *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty. *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Involved Defined. *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined. *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 245.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.02, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.03[4][a] (Matthew Bender).

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C. EVADING

2180. Evading Peace Officer: Death or Serious Bodily Injury

The defendant is charged [in Count ____] with evading a peace officer and causing (death/ [or] serious bodily injury).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **A peace officer in a vehicle was pursuing the defendant, who was also driving a vehicle;**
2. **The defendant intended to evade the peace officer;**
3. **While driving, the defendant willfully fled from, or tried to elude, the pursuing peace officer;**
4. **The defendant's attempt to flee from, or elude, the pursuing peace officer caused (the death of/ [or] serious bodily injury to) someone else;**

AND

5. **All of the following were true:**
   a. **There was at least one lighted red lamp visible from the front of the peace officer's vehicle;**
   b. **The defendant either saw or reasonably should have seen the lamp;**
   c. **The peace officer's vehicle was sounding a siren as reasonably necessary;**
   d. **The peace officer's vehicle was distinctively marked;**

   AND

   e. **The peace officer was wearing a distinctive uniform.**

[A person employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary*

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to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer">.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

A vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

[An act causes (death/ [or] serious bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act and the (death/ [or] injury) would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (death/ [or] serious bodily injury). An act causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death or injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death or injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury on the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].) If the witness is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, §§ 2800.3(a), (b); 2800.1(a).
- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Distinctively Marked Vehicle. *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].

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- Distinctive Uniform. *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine If Peace Officers. *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved. *People v. Hudson* (2006) 38 Cal.4th 1002, 1013 [44 Cal.Rptr.3d 632, 136 P.3d 168]; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 906].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 63, *Double Jeopardy*, § 63.21[2][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.22[1][a][iv], 91.60[2][b][i], [ii], 91.81[1][d], [8] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b][ii][B], 142.02[2][c], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Evading a Pursuing Peace Officer. Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681 [17 Cal.Rptr.2d 278].

RELATED ISSUES

Not Inherently Dangerous Felony

Vehicle Code section 2800.3 is not an inherently dangerous felony and does not support a felony-murder conviction. (*People v. Jones* (2000) 82 Cal.App.4th 663, 668–669 [98 Cal.Rptr.2d 724]; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 974 [103 Cal.Rptr.2d 809].)

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See the Related Issues section to CALCRIM No. 2182, *Evading Peace Officer: Misdemeanor*.

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2181. Evading Peace Officer: Reckless Driving

The defendant is charged [in Count ____] with evading a peace officer with wanton disregard for safety.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **A peace officer driving a motor vehicle was pursuing the defendant;**
2. **The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer;**
3. **During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;**

AND

4. **All of the following were true:**
   a. **There was at least one lighted red lamp visible from the front of the peace officer's vehicle;**
   b. **The defendant either saw or reasonably should have seen the lamp;**
   c. **The peace officer's vehicle was sounding a siren as reasonably necessary;**
   d. **The peace officer's vehicle was distinctively marked;**

   AND

   e. **The peace officer was wearing a distinctive uniform.**

[A person employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

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A person acts with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, (2) and he or she intentionally ignores that risk. The person does not, however, have to intend to cause damage.

[*Driving with willful or wanton disregard for the safety of persons or property* includes, but is not limited to, causing damage to property while driving or committing three or more violations that are each assigned a traffic violation point.]

[_____ <*insert traffic violations alleged*> are each assigned a traffic violation point.]

A vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].) If the witness is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

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Give the bracketed definition of "driving with willful or wanton disregard" if there is evidence that the defendant committed three or more traffic violations. The court may also, at its discretion, give the bracketed sentence that follows this definition, inserting the names of the traffic violations alleged.

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, §§ 2800.2, 2800.1(a).
- Willful or Wanton Disregard. *People v. Schumacher* (1961) 194 Cal.App.2d 335, 339–340 [14 Cal.Rptr. 924].
- Three Violations or Property Damage as Wanton Disregard—Definitional. *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393 [5 Cal.Rptr.3d 274].
- Distinctively Marked Vehicle. *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].
- Distinctive Uniform. *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine If Peace Officers. *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved. *People v. Hudson* (2006) 38 Cal.4th 1002, 1013 [44 Cal.Rptr.3d 632, 136 P.3d 168]; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 906].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.22[1][a][iv] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b][ii][B], 142.02[2][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Evading a Pursuing Peace Officer. Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681 [17 Cal.Rptr.2d 278].
- Failure to Yield. Veh. Code, § 21806; *People v. Diaz* (2005) 125 Cal.App.4th 1484, 1491 [23 Cal.Rptr.3d 653].) (Lesser included offenses may not be used for the requisite "three or more violations.")

RELATED ISSUES

Inherently Dangerous Felony

A violation of Vehicle Code section 2800.2 is not an inherently dangerous felony supporting a felony murder conviction. (*People v. Howard* (2005) 34 Cal.4th 1129, 1139 [23 Cal.Rptr.3d 306, 104 P.3d 107].)

See the Related Issues section to CALCRIM No. 2182, *Evading Peace Officer: Misdemeanor*.

(Revised August 2006)

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2182. Evading Peace Officer: Misdemeanor

The defendant is charged [in Count ____] with evading a peace officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **A peace officer driving a motor vehicle was pursuing the defendant;**
2. **The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer;**

AND

3. **All of the following were true:**
   - **(a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;**
   - **(b) The defendant either saw or reasonably should have seen the lamp;**
   - **(c) The peace officer's vehicle was sounding a siren as reasonably necessary;**
   - **(d) The peace officer's vehicle was distinctively marked;**

   AND

   - **(e) The peace officer was wearing a distinctive uniform.**

[A person employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if** _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp,

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siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].) If the witness is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, § 2800.1(a).
- Distinctively Marked Vehicle. *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].
- Distinctive Uniform. *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].

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- Jury Must Determine If Peace Officers. *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved. *People v. Hudson* (2006) 38 Cal.4th 1002, 1013 [44 Cal.Rptr.3d 632, 136 P.3d 168]; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 906].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 63, *Double Jeopardy*, § 63.21[2][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.22[1][a][iv] (Matthew Bender).

RELATED ISSUES

Multiple Pursuing Officers Constitutes Only One Offense

A defendant "may only be convicted of one count of section 2800.2 even though the pursuit involved multiple police officers in multiple police vehicles." (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163 [132 Cal.Rptr.2d 694].)

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D. RECKLESS DRIVING AND SPEED CONTEST

2200. Reckless Driving

The defendant is charged [in Count ____] with reckless driving.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle (on a highway/in an off-street parking facility);**

AND

2. **The defendant intentionally drove with wanton disregard for the safety of persons or property.**

A person acts with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he or she intentionally ignores that risk. The person does not, however, have to intend to cause damage.

[If you conclude that the defendant drove faster than the legal speed limit, that fact by itself does not establish that the defendant drove with wanton disregard for safety. You may consider the defendant's speed, along with all the surrounding circumstances, in deciding whether the defendant drove with wanton disregard for safety.]

[A *vehicle* is a device by which people or things may be moved on a road or highway. A vehicle does not include a device that is moved only by human power or used only on stationary rails or tracks.]

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.]

[An *off-street parking facility* is an off-street facility open for use

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by the public for parking vehicles. It includes a facility open to retail customers, where no fee is charged for parking.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with reckless driving on a highway (Veh. Code, § 23103(a)), select the phrase "on a highway" in element 1. If the defendant is charged with reckless driving in an off-street parking facility (Veh. Code, § 23103(b)), select that phrase in element 1.

Give the bracketed paragraph that begins with "If you conclude that the defendant was driving faster than" on request if relevant based on the evidence. (*People v. Nowell* (1941) 45 Cal.App.2d Supp. 811, 813–814 [114 P.2d 81].)

The court must define the terms "highway" and "vehicle." Give the bracketed definitions of the terms unless the court has already given these definitions in other instructions. In such cases, the court may give the bracketed sentence stating that the terms are defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements. Veh. Code, § 23103(a) & (b).
- Vehicle Defined. Veh. Code, § 670.
- Highway Defined. Veh. Code, § 360.
- Off-Street Parking Facility Defined. Veh. Code, § 12500(c).
- Willful or Wanton Disregard. *People v. Schumacher* (1961) 194 Cal.App.2d 335, 340 [14 Cal.Rptr. 924]; *People v. Young* (1942) 20 Cal.2d 832, 837 [129 P.2d 353].
- Gross Negligence Insufficient. *People v. Allison* (1951) 101 Cal.App.2d Supp. 932, 935 [226 P.2d 85].
- Speeding May Constitute Recklessness Based on Circumstances. *People v. Nowell* (1941) 45 Cal.App.2d Supp. 811, 813–814 [114 P.2d 81].

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- Requires Reckless Act of Driving, Not Merely Mental State. *People v. McNutt* (1940) 40 Cal.App.2d Supp. 835, 838–839 [105 P.2d 657]; *People v. Smith* (1939) 36 Cal.App.2d Supp. 748, 751 [92 P.2d 1039].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 204.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.60[2][b][i], [ii], 91.81[1][d], [8] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

RELATED ISSUES

Offense Is a Misdemeanor, Not an Infraction

Reckless driving is a misdemeanor and may not be reduced to an infraction. (*People v. Dibacco* (2004) 117 Cal.App.4th Supp. 1, 4 [12 Cal.Rptr.3d 258].)

Speeding Not Necessarily Lesser Included Offense

Speeding is not a necessarily lesser included offense of reckless driving. (*People v. Dibacco* (2004) 117 Cal.App.4th Supp. 1, 4 [12 Cal.Rptr.3d 258].)

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2201. Speed Contest

The defendant is charged [in Count ____] with engaging in a speed contest.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a motor vehicle on a highway;**

AND

2. **While so driving, the defendant willfully engaged in a speed contest.**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A person *engages in a speed contest* when he or she uses a motor vehicle to race against another vehicle, a clock, or other timing device. [A *speed contest* does not include an event in which the participants measure the time required to cover a set route of more than 20 miles but where the vehicle does not exceed the speed limits.]

[A *motor vehicle* includes a (passenger vehicle/motorcycle/bus/ school bus/commercial vehicle/truck tractor/_____ <*insert other type of motor vehicle*>**).]**

[The term highway describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle*/ [and] *highway*) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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The court must define the terms "motor vehicle" and "highway." Give the bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant is charged with aiding and abetting a speed contest under Vehicle Code section 23109(b), give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*. This instruction also must be given, but the court should modify the first sentence and change "defendant" to "perpetrator" throughout the instruction.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements. Veh. Code, § 23109(a).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Motor Vehicle Defined. Veh. Code, § 415.
- Highway Defined. Veh. Code, § 360.
- Speed Contest. *In re Harvill* (1959) 168 Cal.App.2d 490, 492–493 [335 P.2d 1016] [discussing prior version of statute].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 254.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

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2202. Exhibition of Speed

The defendant is charged [in Count ____] with engaging in an exhibition of speed.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a motor vehicle on a highway;**

AND

2. **While so driving, the defendant willfully engaged in an exhibition of speed.**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A person *engages in an exhibition of speed* when he or she accelerates or drives at a rate of speed that is dangerous and unsafe in order to show off or make an impression on someone else.

[The People must prove that the defendant intended to show off or impress someone but are not required to prove that the defendant intended to show off to or impress any particular person.]

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court must define the terms "motor vehicle" and "highway." Give the bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant is charged with aiding and abetting an exhibition of speed, give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*. This instruction also must be given, but the court should modify the first sentence and change "defendant" to "perpetrator" throughout the instruction.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements. Veh. Code, § 23109(c).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Motor Vehicle Defined. Veh. Code, § 415.
- Highway Defined. Veh. Code, § 360.
- Exhibition of Speed Defined. *People v. Grier* (1964) 226 Cal.App.2d 360, 364 [38 Cal.Rptr. 11]; *In re Harvill* (1959) 168 Cal.App.2d 490, 492–493 [335 P.2d 1016] [discussing prior version of statute]; see also *Tischoff v. Wolfchief* (1971) 16 Cal.App.3d 703, 707 [94 Cal.Rptr. 299] [term did not require definition in civil case].
- Screeching Tires. *In re F. E.* (1977) 67 Cal.App.3d 222, 225 [136 Cal.Rptr. 547]; *People v. Grier* (1964) 226 Cal.App.2d 360, 363 [38 Cal.Rptr. 11].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 254.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

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E. LICENSING OFFENSES

2220. Driving With Suspended or Revoked License

The defendant is charged [in Count ____] with driving while (his/her) driver's license was (suspended/ [or] revoked).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a motor vehicle while (his/her) driver's license was (suspended/ [or] revoked) [for _____ <*insert basis for suspension or revocation*>];**

AND

2. **When the defendant drove, (he/she) knew that (his/her) driver's license was (suspended/ [or] revoked).**

[If the People prove that:

1. **The California Department of Motor Vehicles mailed a notice to the defendant telling (him/her) that (his/her) driver's license had been (suspended/ [or] revoked);**
2. **The notice was sent to the most recent address reported to the department [or any more recent address reported by the person, a court, or a law enforcement agency];**

AND

3. **The notice was not returned to the department as undeliverable or unclaimed;**

then you may, but are not required to, conclude that the defendant knew that (his/her) driver's license was (suspended/ [or] revoked).]

[If the People prove beyond a reasonable doubt that a court informed the defendant that (his/her) driver's license had been (suspended/ [or] revoked), you may but are not required to conclude that the defendant knew that (his/her) driver's license was (suspended/ [or] revoked).]

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[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[The term *motor vehicle* is defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, the court may insert the reason for the suspension or revocation unless the court has accepted a stipulation regarding this issue.

The two bracketed paragraphs that begin with "If the People prove" each explain rebuttable presumptions created by statute. (See Veh. Code, §§ 14601(a), 14601.1(a), 14602(c), 14601.5(c); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [658 P.2d 1302].) In accordance with *Roder,* the bracketed paragraphs have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove that the California Department of Motor Vehicles mailed a notice" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her license was revoked or suspended.

Similarly, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that a court informed the defendant" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her license was revoked or suspended. In addition, this provision regarding notice by the court only

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applies if the defendant is charged with a violation of Vehicle Code section 14601.2. (See Veh. Code, § 14601.2(c).) Do not give this paragraph if the defendant is charged under any other Vehicle Code section.

Give the bracketed definition of motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5.
- Motor Vehicle Defined. Veh. Code, § 415.
- Actual Knowledge of Suspension or Revocation Required. *In re Murdock* (1968) 68 Cal.2d 313, 315–316 [66 Cal.Rptr. 380, 437 P.2d 764].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 239.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.08[6] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

RELATED ISSUES

Suspension or Revocation Continues Until License Restored

In *People v. Gutierrez* (1998) 65 Cal.App.4th Supp. 1 [76 Cal.Rptr.2d 166], the defendant's license had been suspended for a period of one year

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for driving under the influence. The defendant was arrested for driving after that one-year period had expired. The court held that the defendant's license remained suspended even though the stated time period had passed because the defendant had not taken the steps necessary to restore his driving privilege. (*Id.* at pp. 8–9.)

Privilege to Drive May Be Suspended or Revoked Even If No License Issued

A person's privilege to drive may be suspended or revoked even though that person has never been issued a valid driver's license. (*People v. Matas* (1988) 200 Cal.App.3d Supp. 7, 9 [246 Cal.Rptr. 627].)

May Be Punished for This Offense and Driving Under the Influence

In *In re Hayes* (1969) 70 Cal.2d 604, 611 [75 Cal.Rptr. 790, 451 P.2d 430], the court held that Penal Code section 654 did not preclude punishing the defendant for both driving under the influence and driving with a suspended license.

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2221. Driving Without a License

The defendant is charged [in Count ____] with driving without a license.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a motor vehicle on a highway;**

[AND]

2. **When the defendant drove, (he/she) did not hold a valid California driver's license(;/.)**

<Give element 3 when instructing on statutory exemption.>

[AND

3. **The defendant was not excused from the requirement to have a California driver's license.]**

Whether the defendant was properly licensed is a matter within (his/her) own knowledge. The defendant must produce evidence tending to show that (he/she) did hold a valid driver's license. If the evidence raises in your mind a reasonable doubt about whether the defendant held a valid driver's license, you must find the defendant not guilty of this crime.

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Exemptions to the licensing requirement are stated in Vehicle Code sections 12501 to 12505. If there is sufficient evidence that the defendant was exempt, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3.

The court must define the terms "highway" and "motor vehicle." Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements. Veh. Code, § 12500(a).
- Offense Is a Misdemeanor. Veh. Code, § 40000.11(b).
- Motor Vehicle Defined. Veh. Code, § 415.
- Highway Defined. Veh. Code, § 360.
- Instruction on Production of Evidence. *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1164 [132 Cal.Rptr.2d 694]; *In re Shawnn F.* (1995) 34 Cal.App.4th 184, 198–199 [40 Cal.Rptr.2d 263].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 238.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.08[6] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

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2222. Failing to Present Driver's License

The defendant is charged [in Count ____] with failing to present (his/her) driver's license to a peace officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a motor vehicle;**
2. **A peace officer, enforcing the Vehicle Code, demanded that the defendant present (his/her) driver's license for the officer to examine;**

AND

3. **The defendant did not present (his/her) driver's license in response to the officer's request.**

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ <*insert other type of motor vehicle*>).]

[The term *motor vehicle* is defined in another instruction to which you should refer.]

[A person employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed definition of motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

AUTHORITY

- Elements. Veh. Code, § 12951(b).

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- Offense Is a Misdemeanor. Veh. Code, § 40000.11(h).
- Motor Vehicle Defined. Veh. Code, § 415.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 238.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.22[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

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F. OTHER VEHICLE OFFENSES

2240. Failure to Appear

The defendant is charged [in Count ____] with failing to appear in court.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant received a citation;**
2. **In connection with that citation, the defendant signed a written promise to appear(in court/[or] before a person authorized to receive a deposit of bail);**

AND

3. **The defendant willfully failed to appear (in court/[or] before a person authorized to receive a deposit of bail).**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[It does not matter whether the defendant was found guilty of the violation of the Vehicle Code alleged in the original citation.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Veh. Code, § 40508(a).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

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Secondary Sources

4 Witkin, California Criminal Law (3d ed. 2000) Pretrial, § 50.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.22[2], Ch. 12, *Bail*, § 12.04 (Matthew Bender).

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2241. Driver and Driving Defined

[A *driver* is a person who drives or is in actual physical control of a vehicle.]

[A person *drives* a vehicle when he or she intentionally causes it to move by exercising actual physical control over it. The person must cause the vehicle to move, but the movement may be slight.]

BENCH NOTES

Instructional Duty

No case has held that the court has a sua sponte duty to define "driver" or "driving." This instruction is provided for the court to use, on request, at its discretion.

AUTHORITY

- Driver Defined. Veh. Code, § 305.
- Driving Defined. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 763–765 [208 Cal.Rptr. 745, 809 P.2d 404].
- Slight Movement Sufficient. *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Music v. Dept. of Motor Vehicles* (1990) 221 Cal.App.3d 841, 850 [270 Cal.Rptr. 692].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

RELATED ISSUES

Circumstantial Evidence

Driving may be established through circumstantial evidence. (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 770 [280 Cal.Rptr. 745, 809 P.2d 404].) For example, in *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540], the court found sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the

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on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running.

Engine Need Not Be On

In *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1184 [269 Cal.Rptr. 21], the court held that the defendant was "driving" because he was "seated in the driver's seat steering or controlling the truck while it was still moving, even though the engine was no longer running." (See also *People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 9 [142 Cal.Rptr. 401] [defendant "driving" a moped when she moved it by pedaling, even though the engine was not on].)

Steering Vehicle

In *In re Queen T.* (1993) 14 Cal.App.4th 1143, 1145 [17 Cal.Rptr.2d 922], the court held that the minor was "driving" when she steered the vehicle, even though someone else was sitting in the driver's seat operating the accelerator and brake.

Relocating Vehicle in Accident

In *People v. Kelley* (1937) 27 Cal.App.2d Supp. 771, 773 [70 P.2d 276], the court held that the defendant was not "driving" when he got in the driver's seat and steered a disabled vehicle, moving it four or five feet to a safe location following an accident. The court specifically stated that its holding was based on the unique facts of the case and that it was not attempting to "give a definition to the word 'drive.' " (*Id.* at p. 775.)

(New January 2006)

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CONTROLLED SUBSTANCES

A. CONTROLLED SUBSTANCES

2300. Sale, Transportation, etc., of Controlled Substance
2301. Offering to Sell, Transport, etc., a Controlled Substance
2302. Possession for Sale of Controlled Substance
2303. Possession of Controlled Substance While Armed With Firearm
2304. Simple Possession of Controlled Substance
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B. SUBSTITUTE SUBSTANCE

2315. Sale of Substitute Substance
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2320. Forged Prescription for Narcotic
2321. Forged Prescription for Narcotic: With Possession of Drug
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D. MANUFACTURING

(i) Manufacturing and Offering

2330. Manufacturing a Controlled Substance
2331. Offering to Manufacture a Controlled Substance
2332–2334. Reserved for Future Use

(ii) Possession of Materials

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2337. Possession With Intent to Manufacture Methamphetamine

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2338. Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance

2339–2349. Reserved for Future Use

E. MARIJUANA

(i) Sale, Offering to Sell, Possession for Sale

2350. Sale, Furnishing, etc., of Marijuana

2351. Offering to Sell, Furnish, etc., Marijuana

2352. Possession for Sale of Marijuana

2353–2359. Reserved for Future Use

(ii) Transportation or Offering to Transport

2360. Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor

2361. Transporting or Giving Away Marijuana: More Than 28.5 Grams

2362. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor

2363. Offering to Transport or Give Away Marijuana: More Than 28.5 Grams

2364–2369. Reserved for Future Use

(iii) Planting

2370. Planting, etc., Marijuana

2371–2374. Reserved for Future Use

(iv) Simple Possession

2375. Simple Possession of Marijuana: Misdemeanor

2376. Simple Possession of Marijuana on School Grounds: Misdemeanor

2377. Simple Possession of Concentrated Cannabis

2378–2379. Reserved for Future Use

F. OFFENSES INVOLVING MINORS

(i) Controlled Substances

2380. Sale, Furnishing, etc., of Controlled Substance to Minor

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2381. Offering to Sell, Furnish, etc., Controlled Substance to Minor
2382. Employment of Minor to Sell Controlled Substance
2383. Use of Minor as Agent to Violate Controlled Substance Law
2384. Inducing Minor to Violate Controlled Substance Laws
2385–2389. Reserved for Future Use

(ii) Marijuana

2390. Sale, Furnishing, etc., of Marijuana to Minor
2391. Offering to Sell, Furnish, etc., Marijuana to Minor
2392. Employment of Minor to Sell, etc., Marijuana
2393. Inducing Minor to Use Marijuana
2394–2399. Reserved for Future Use

G. USE AND POSSESSION OF PARAPHERNALIA

(i) Use

2400. Using or Being Under the Influence of Controlled Substance
2401. Aiding and Abetting Unlawful Use of Controlled Substance
2402–2409. Reserved for Future Use

(ii) Possession of Paraphernalia

2410. Possession of Controlled Substance Paraphernalia
2411. Possession of Hypodermic Needle or Syringe
2412. Fraudulently Obtaining a Hypodermic Needle or Syringe
2413. Using or Permitting Improper Use of a Hypodermic Needle or Syringe
2414–2429. Reserved for Future Use

H. MONEY FROM CONTROLLED SUBSTANCES

2430. Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Proceeds
2431. Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Money to Purchase
2432. Attorney's Possession of More Than $100,000 Related to Transaction Involving Controlled Substance

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2433–2439. Reserved for Future Use

I. OTHER RELATED OFFENSES

2440. Maintaining a Place for Controlled Substance Sale or Use

2441. Use of False Compartment to Conceal Controlled Substance

2442–2499. Reserved for Future Use

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A. CONTROLLED SUBSTANCES

2300. Sale, Transportation, etc., of Controlled Substance

The defendant is charged [in Count ____] with (selling/furnishing/administering/giving away/transporting/importing) _____ <*insert type of controlled substance*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold/furnished/administered/gave away/transported/imported into California) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**

[AND]

4. **The controlled substance was _____ <*insert type of controlled substance*>(;/.)**

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND

5. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are

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not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported/imported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (sell/furnish/administer/transport/import/give it away) [it]. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Transportation of a controlled substance requires a "usable amount." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11352, 11379.
- Administering. Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].

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- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount. *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–102.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale. Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

Note: In reviewing the appropriateness of sentencing enhancements, *People v. Valenzuela* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

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RELATED ISSUES

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. *(Ibid.)* "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . ." (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

Transportation for Personal Use

A defendant convicted of transporting a controlled substance "for personal use" is entitled to be sentenced to probation with drug treatment pursuant to Penal Code section 1210(a); see *People v. Barasa* (2002) 103 Cal.App.4th 287, 295–297 [126 Cal.Rptr.2d 628].) Two cases have held that the judge, not the jury, may determine whether the defendant transported the drugs for personal use. (*People v. Barasa, supra,* 103 Cal.App.4th at pp. 294–295; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 [7 Cal.Rptr.3d 4].)

(New January 2006)

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2301. Offering to Sell, Transport, etc., a Controlled Substance

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The defendant is charged [in Count ____] with offering to (sell/furnish/administer/give away/transport/import) _____ <*insert type of controlled substance*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] offered to (sell/furnish/administer/give away/transport/import into California) _____ <*insert type of controlled substance*>, a controlled substance;**

AND

2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away/transport/import) the controlled substance.**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Health & Saf. Code, §§ 11352, 11379.
- Administering. Health & Saf. Code, § 11002.
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g]–[j] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale. Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

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2302. Possession for Sale of Controlled Substance

The defendant is charged [in Count ____] with possession for sale of _____ <*insert type of controlled substance*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**
5. **The controlled substance was _____ <*insert type of controlled substance*>;**

AND

6. **The controlled substance was in a usable amount.**

***Selling* for the purpose of this instruction means exchanging _____ <*insert type of controlled substance*> for money, services, or anything of value.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [e] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance. *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465].
- Possession of cocaine for sale is not necessarily included offense of selling cocaine base. People v. Murphy (2005) 134 Cal.App.4th 1504, 1508 [134 Cal.Rptr.3d 872])

(New January 2006)

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2303. Possession of Controlled Substance While Armed With Firearm

---

The defendant is charged [in Count ____] with possessing _____ <*insert type of controlled substance specified in Health & Saf. Code, § 11370.1*>, a controlled substance, while armed with a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was _____ <*insert type of controlled substance specified in Health & Saf. Code, § 11370.1*>;**
5. **The controlled substance was in a usable amount;**
6. **While possessing that controlled substance, the defendant had a loaded, operable firearm available for immediate offensive or defensive use;**

AND

7. **The defendant knew that (he/she) had the firearm available for immediate offensive or defensive use.**

Knowledge that an available firearm is loaded and operable is not required.

A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion.

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

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[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge of Controlled Substance. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Loaded Firearm. *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Knowledge of Presence of Firearm. *People v. Singh* (2004) 119 Cal.App.4th 905, 912–913 [14 Cal.Rptr.3d 769].
- Knowledge That Firearm is Loaded or Operable Not Required. *People v. Heath* (2005) 134 Cal.App.4th 490, 498.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 80.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][f]; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance. Health & Saf. Code, §§ 11350, 11377.

See also Firearm Possession instructions, CALCRIM Nos. 2510 to 2530.

RELATED ISSUES

Loaded Firearm

"Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

(Revised August 2006)

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2304. Simple Possession of Controlled Substance

The defendant is charged [in Count ____] with possessing _____ <*insert type of controlled substance*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was _____ <*insert type of controlled substance*>;**

AND

5. **The controlled substance was in a usable amount.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something, to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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<Defense: Prescription>

[The defendant is not guilty of possessing _____ <*insert type of controlled substance*> if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, [naturopathic doctor], or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Defenses—Instructional Duty

The prescription defense is codified in Health and Safety Code sections 11350 and 11377. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense.

A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11350, 11377; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].

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- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 77–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [2][b] (Matthew Bender).

(Revised August 2006)

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2305. Defense: Momentary Possession of Controlled Substance

If you conclude that the defendant possessed _____ <*insert name of controlled substance*>, that possession was not illegal if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **The defendant possessed _____ <*insert name of controlled substance*> only for a momentary or transitory period;**
2. **The defendant possessed _____ <*insert name of controlled substance*> in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **The defendant did not intend to prevent law enforcement officials from obtaining the _____ <*insert name of controlled substance*>.**

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the three listed items is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of transitory possession when supported by the evidence. (*People v. Mijares* (1971) 6 Cal.3d 415, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].)

This defense "applies only to momentary or transitory possession of contraband for the purpose of disposal . . . ." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191 [108 Cal.Rptr.2d 599, 25 P.3d 1081] [disapproving of *People v. Cole* (1988) 202 Cal.App.3d 1439, 1445 [249 Cal.Rptr. 601], which had held that the length of time the contraband was possessed was just one factor to consider].) As the *Martin* court explained, the defense is

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established if the evidence shows "brief or transitory possession of narcotics with the intent to dispose of the contraband." (*Id.* at p. 1191, fn. 9.) The *Martin* court did not state that the defendant must also specifically intend to end someone else's unlawful possession of the contraband or prevent someone else from obtaining the contraband. Thus, the committee has not included this as an element.

AUTHORITY

- Momentary Possession. *People v. Martin* (2001) 25 Cal.4th 1180, 1191 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Mijares* (1971) 6 Cal.3d 415, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Burden on Defendant to Establish by Preponderance. *People v. Spry* (1997) 58 Cal.App.4th 1345, 1369 [68 Cal.Rptr.2d 691] [noted as valid authority on this holding in *People v. Martin* (2001) 25 Cal.4th 1180, 1192, fn. 10 [108 Cal.Rptr.2d 599, 25 P.3d 1081]]; see also *People v. Mower* (2002) 28 Cal.4th 457, 480, fn. 8 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][d] (Matthew Bender).

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B. SUBSTITUTE SUBSTANCE

2315. Sale of Substitute Substance

The defendant is charged [in Count ____] with (selling/transporting/administering/giving/furnishing/delivering) a substance in lieu of _____ <*insert name of controlled substance*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (agreed/consented/offered/arranged/negotiated) to (sell/transport/administer/give/furnish/deliver) _____ <*insert name of controlled substance*>, a controlled substance;**

AND

2. **After doing so, the defendant (sold/transported/administered/gave/furnished/delivered) a substance in lieu of _____ <*insert name of controlled substance*>.**

[*Selling* for the purpose of this instruction means exchanging the substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Health & Saf. Code, §§ 11355, 11382; *People v. McDaniel* (1979) 24 Cal.3d 661, 669–670 [156 Cal.Rptr. 865, 597 P.2d 124].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 102.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g]–[i] (Matthew Bender).

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2316. Offer to Sell Substitute Substance

The defendant is charged [in Count ____] with intending to (sell/transport/administer/give/furnish/deliver) a noncontrolled substance in lieu of _____ <*insert name of controlled substance*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] offered to (sell/transport/administer/give/furnish/deliver) _____ <*insert name of controlled substance*>, a controlled substance;**

AND

2. **When the defendant made the offer, (he/she) intended to (sell/transport/administer/give/furnish/deliver) a noncontrolled substance in lieu of _____ <*insert name of controlled substance*>.]**

[*Selling* for the purpose of this instruction means exchanging a noncontrolled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[The People do not need to prove that the defendant actually possessed the noncontrolled substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Health & Saf. Code, §§ 11355, 11382; *People v. McDaniel* (1979) 24 Cal.3d 661, 669–670 [156 Cal.Rptr. 865, 597 P.2d 124].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 102.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g]–[j] (Matthew Bender).

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C. FORGED SUBSTANCE

2320. Forged Prescription for Narcotic

The defendant is charged [in Count ____] with ((forging/altering) a prescription/giving someone (a forged/an altered) prescription/ using [or attempting to use] (a forged/an altered) prescription) for a narcotic drug.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—forged or altered>

[1. The defendant (forged/altered) a prescription;]

<Alternative 1B—issued>

[1. The defendant gave someone (a prescription with a forged or fictitious signature/an altered prescription);]

<Alternative 1C—used or attempted to use>

[1. The defendant used [or attempted to use] (a prescription with a forged or fictitious signature) to obtain drugs;]

[AND]

2. The prescription was for a narcotic drug(;/.)

<Give element 3 when giving alternative 1B or 1C.>

[AND

3. The defendant knew that the (signature on the prescription was forged or fictitious/prescription was altered).]

_____ *<insert name or description of narcotic from Health & Saf. Code, § 11019>* **is a narcotic drug.**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Use this instruction when the prosecution alleges that the defendant forged, issued, or attempted to use a forged prescription without actually obtaining the narcotic. When the prosecution alleges that the defendant obtained or possessed the narcotic by using a forged prescription, use CALCRIM No. 2321, *Forged Prescription for Narcotic: With Possession of Drug*.

Give element 3 when the prosecution alleges that the defendant issued, used, or attempted to use an altered or forged prescription. Do not give element 3 when the prosecution alleges that the defendant personally forged or altered the prescription.

AUTHORITY

- Elements. Health & Saf. Code, § 11368; *People v. Beesley* (1931) 119 Cal.App. 82, 86 [6 P.2d 114] [intent to defraud not an element]; *People v. Katz* (1962) 207 Cal.App.2d 739, 745 [24 Cal.Rptr. 644].
- Narcotic Drug. Health & Saf. Code, § 11019.
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- Forgery of Prescription by Telephone. *People v. Jack* (1965) 233 Cal.App.2d 446, 455 [43 Cal.Rptr. 566].

Secondary Sources

2 Witkin & Epstein, California. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 119–120.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [2][b], [c] (Matthew Bender).

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2321. Forged Prescription for Narcotic: With Possession of Drug

The defendant is charged [in Count ____] with (obtaining/ possessing) a narcotic drug [obtained] with (a/an) (forged[,]/ fictitious[,]/ [or] altered) prescription.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (obtained/possessed) a narcotic drug;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a narcotic drug;**
4. **The narcotic drug was in a usable amount;**
5. **The narcotic drug was obtained by using (a/an) (forged[,]/ fictitious[,]/ [or] altered) prescription;**

AND

6. **The defendant knew that the narcotic was obtained using (a/an) (forged[,]/ fictitious[,]/ [or] altered) prescription.**

_____ <*insert name or description of narcotic from Health & Saf. Code, § 11019*> **is a *narcotic drug*.**

A *usable amount* is a quantity that is enough to be used by someone as a narcotic drug. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific narcotic drug (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a narcotic drug.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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[Agreeing to buy a narcotic drug does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Use this instruction when the prosecution alleges that the defendant obtained or possessed the narcotic by using a forged prescription. When the prosecution alleges that the defendant forged or attempted to use a forged prescription without obtaining the narcotic, use CALCRIM No. 2320, *Forged Prescription for Narcotic*.

AUTHORITY

- Elements. Health & Saf. Code, § 11368; *People v. Beesley* (1931) 119 Cal.App. 82, 86 [6 P.2d 114] [intent to defraud not an element]; *People v. Katz* (1962) 207 Cal.App.2d 739, 745 [24 Cal.Rptr. 644].
- Narcotic Drug. Health & Saf. Code, § 11019.
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- Forgery of Prescription by Telephone. *People v. Jack* (1965) 233 Cal.App.2d 446, 455 [43 Cal.Rptr. 566].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 119–120.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [2][b], [c] (Matthew Bender).

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D. MANUFACTURING

(i) Manufacturing and Offering

2330. Manufacturing a Controlled Substance

The defendant is charged [in Count ____] with (manufacturing/compounding/converting/producing/deriving/processing/preparing) _____ <*insert controlled substance from Health & Saf. Code, §§ 11054, 11055, 11056, 11057, or 11058*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (manufactured/compounded/converted/produced/derived/processed/prepared) a controlled substance, specifically _____ <*insert controlled substance*>, using chemical extraction or independent chemical synthesis;**

AND

2. **The defendant knew of the substance's nature or character as a controlled substance.**

[The chemical extraction or independent chemical synthesis may be done either directly or indirectly.]

[The People do not need to prove that the defendant knew which specific controlled substance was involved, only that (he/she) was aware that it was a controlled substance.]

[The People do not need to prove that the defendant completed the process of manufacturing or producing a controlled substance. Rather, the People must prove that the defendant knowingly participated in the beginning or intermediate steps to process or make a controlled substance. [Thus, the defendant is guilty of this crime if the People have proved that:

1. **The defendant engaged in the synthesis, processing, or preparation of a chemical that is not itself a controlled substance;**

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AND

2. The defendant knew that the chemical was going to be used in the manufacture of a controlled substance.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed paragraph stating that "The People do not need to prove that the defendant completed the process" when the evidence indicates that the defendant completed only initial or intermediary stages of the process. (*People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503–1504 [267 Cal.Rptr. 841]; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813 [23 Cal.Rptr.2d 640].) Give the final bracketed section stating "Thus, the defendant is guilty" when the evidence shows that the defendant manufactured a precursor chemical, such as ephedrine, but had not completed the process of manufacturing a controlled substance. (*People v. Pierson* (2000) 86 Cal.App.4th 983, 992 [103 Cal.Rptr.2d 817].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11379.6(a) & (b), 11054–11058.
- Knowledge of Controlled Substance. *People v. Coria* (1999) 21 Cal.4th 868, 874 [89 Cal.Rptr.2d 650, 985 P.2d 970].
- Initial or Intermediary Stages. *People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503–1504 [267 Cal.Rptr. 841]; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813 [23 Cal.Rptr.2d 640]; *People v. Heath* (1998) 66 Cal.App.4th 697, 703–704 [78 Cal.Rptr.2d 240].
- Precursor Chemicals. *People v. Pierson* (2000) 86 Cal.App.4th 983, 992 [103 Cal.Rptr.2d 817].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 112.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [f] (Matthew Bender).

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RELATED ISSUES

Providing Place for Manufacture

Health and Safety Code section 11366.5 prohibits providing a place for the manufacture or storage of a controlled substance. A defendant who provides a place for the manufacture of a controlled substance may be convicted both as an aider and abettor under Health and Safety Code section 11379.6 and as a principal under Health and Safety Code section 11366.5. (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 923 [33 Cal.Rptr.2d 155]; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208 [10 Cal.Rptr.2d 363].) Conviction under Health and Safety Code section 11379.6 requires evidence that the defendant specifically intended to aid the manufacture of the controlled substance, while conviction under Health and Safety Code section 11366.5 requires evidence that the defendant knew that the controlled substance was for sale or distribution. (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 923 [33 Cal.Rptr.2d 155]; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208 [10 Cal.Rptr.2d 363].)

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2331. Offering to Manufacture a Controlled Substance

The defendant is charged [in Count ____] with offering to (manufacture/compound/convert/produce/derive/process/prepare) _____ <*insert controlled substance from Health & Saf. Code, §§ 11054, 11055, 11056, 11057, or 11058*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant offered to (manufacture/compound/convert/produce/derive/process/prepare) a controlled substance, specifically _____ <*insert controlled substance*>, intending to use chemical extraction or independent chemical synthesis;**

AND

2. **When the defendant made the offer, (he/she) intended to (manufacture/compound/convert/produce/derive/process/prepare) the controlled substance.**

[The intent to use chemical extraction or chemical synthesis includes the intent to use such methods directly or indirectly.]

[The People do not need to prove that the defendant knew which specific controlled substance was involved, only that (he/she) was aware that it was a controlled substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11379.6(a) & (c), 11054–11058.
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

Secondary Sources

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2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 112.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [f] (Matthew Bender).

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(ii) Possession of Materials

2335. Possession With Intent to Manufacture Methamphetamine or N-ethylamphetamine

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The defendant is charged [in Count ____] with possessing substances with the intent to manufacture (methamphetamine/N-ethylamphetamine).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed both (methylamine and phenyl-2-propanone/ethylamine and phenyl-2-propanone) at the same time;**

AND

2. **When the defendant possessed both those substances, (he/she) intended to use them to manufacture (methamphetamine/N-ethylamphetamine).**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with possessing isomers or precursor chemicals under Health and Safety Code section 11383(e), (f), (g), or (h), give CALCRIM No. 2338, *Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance*, instead of this instruction.

AUTHORITY

- Elements. Health & Saf. Code, § 11383(a).

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- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Specific Intent Required. *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583 [154 Cal.Rptr. 309].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [d], [3][d] (Matthew Bender).

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2336. Possession With Intent to Manufacture PCP

The defendant is charged [in Count ____] with possessing substances with the intent to manufacture phencyclidine (PCP) [or _____ <*insert analog from Health & Saf. Code, § 11054(d)(22) or § 11055(e)(3)*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed both (piperidine and cyclohexanone/pyrrolidine and cyclohexanone/morpholine and cyclohexanone) at the same time, either as individual substances or combined together in one substance;**

AND

2. **When the defendant possessed those substances, (he/she) intended to use them to manufacture phencyclidine (PCP) [or _____ <*insert analog from Health & Saf. Code, § 11054(d)(22) or § 11055(e)(3)*>].**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with possessing isomers or precursor chemicals under Health and Safety Code section 11383(e), (f), (g), or (h), give CALCRIM No. 2338, *Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance*, instead of this instruction.

AUTHORITY

- Elements. Health & Saf. Code, § 11383(b).

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- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Specific Intent Required. *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583 [154 Cal.Rptr. 309].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [d], [3][d] (Matthew Bender).

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2337. Possession With Intent to Manufacture Methamphetamine

The defendant is charged [in Count ____] with possessing substances with the intent to manufacture methamphetamine [or _____ <*insert analog from Health & Saf. Code, § 11055(d)*>].

To prove that the defendant is guilty of this crime, the People must prove that:

<*Alternative 1A—ephedrine or pseudoephedrine*>

[1. The defendant possessed [a substance containing] (ephedrine/ [or] pseudoephedrine) [or any salts, isomers, or salts of isomers of (ephedrine/ [or] pseudoephedrine)];]

<*Alternative 1B—other listed substances*>

[1. The defendant possessed both _____ <*insert substances from Health & Saf. Code, § 11383(c)*> at the same time, either as individual substances or combined together in one substance;]

AND

2. When the defendant possessed (that/those) substance[s], (he/she) intended to use (it/them) to manufacture methamphetamine [or _____ <*insert analog from Health & Saf. Code, § 11055(d)*>].

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with possessing isomers or precursor chemicals under Health and Safety Code section 11383(e), (f), (g), or (h), give

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CALCRIM No. 2338, *Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance*, instead of this instruction.

AUTHORITY

- Elements. Health & Saf. Code, § 11383(c).
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Specific Intent Required. *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583 [154 Cal.Rptr. 309].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [d], [3][d] (Matthew Bender).

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2338. Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance

The defendant is charged [in Count ____] with possessing substances with the intent to manufacture (methamphetamine [or _____ <*insert analog of methamphetamine from Health & Saf. Code, § 11055(d)*>]/N-ethylamphetamine/phencyclidine (PCP) [or _____ <*insert analog of PCP from Health & Saf. Code, § 11054(d) or § 11055(e)*>]).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed** _____ <*insert name or description of substance[s] from Health & Saf. Code, § 11383(e), (f), (g), or (h)*>**;**

AND

2. **When the defendant possessed (that/those) substance[s], (he/she) intended to use (it/them) to manufacture (methamphetamine [or** _____ <*insert analog of methamphetamine from Health & Saf. Code, § 11055(d)*>**]/N-ethylamphetamine/phencyclidine (PCP) [or** _____ <*insert analog of PCP from Health & Saf. Code, § 11054(d) or § 11055(e)*>**]).**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Effective January 1, 2004, subdivisions (e), (f), (g), and (h) of Health and Safety Code section 11383 make it a felony to possess any of the following: isomers of other substances listed in that section, precursor

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chemicals sufficient for manufacturing listed substances, chemicals sufficient to manufacture hydriodic acid or another reducing agent, and compounds or mixtures containing listed substances. In element 1, the court should insert the name or description of the specific substances the defendant is charged with possessing.

AUTHORITY

- Elements. Health & Saf. Code, § 11383(e), (f), (g) & (h).
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Specific Intent Required. *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583 [154 Cal.Rptr. 309].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [d], [3][d] (Matthew Bender).

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E. MARIJUANA

(i) Sale, Offering to Sell, Possession for Sale

2350. Sale, Furnishing, etc., of Marijuana

The defendant is charged [in Count ____] with (selling/furnishing/administering/importing) marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold/furnished/administered/imported into California) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**

[AND]

4. **The controlled substance was marijuana(;/.)**

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND

5. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

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[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/imported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (sell/furnish/administer/import) it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not give element 5 or the bracketed definition of "usable amount." There is no case law on whether furnishing, administering, or importing require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 5 and the definition of usable amount are provided for the court to use at its discretion.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The

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second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering. Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Not a Defense. *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [g]–[i], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana. Health & Saf. Code, § 11359.

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RELATED ISSUES

Medical Marijuana Not a Defense to Sales

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra,* 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use]; *People v. Wright* (2004) 121 Cal.App.4th 1356 [18 Cal.Rptr.3d 220], review granted Dec. 1, 2004, S128442 [Supreme Court granted review on issue of whether evidence of compassionate use admissible in case where possession for sale charged].) There is no case law on whether compassionate use may be raised as a defense to "furnishing" or "administering" marijuana.

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2351. Offering to Sell, Furnish, etc., Marijuana

The defendant is charged [in Count ____] with offering to (sell/furnish/administer/import) marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant offered to (sell/furnish/administer/import into California) marijuana, a controlled substance;**

AND

2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/import) the controlled substance.**

[*Selling* for the purpose of this instruction means exchanging marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant actually possessed the marijuana.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

AUTHORITY

- Elements. Health & Saf. Code, § 11360; *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 468, 381 P.2d 1].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering. Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Compassionate Use Not a Defense. *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g]–[j], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana. Health & Saf. Code, § 11359.

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RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

Medical Marijuana Not a Defense to Sales or Offering to Sell

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales or offering to sell under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra,* 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use]; *People v. Wright* (2004) 121 Cal.App.4th 1356 [18 Cal.Rptr.3d 220], review granted Dec. 1, 2004, S128442 [Supreme Court granted review on issue of whether evidence of compassionate use admissible in case where possession for sale charged].) There is no case law on whether compassionate use may be raised as a defense to "furnishing" or "administering" marijuana.

(New January 2006)

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2352. Possession for Sale of Marijuana

The defendant is charged [in Count ____] with possessing for sale marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**
5. **The controlled substance was marijuana;**

AND

6. **The controlled substance was in a usable amount.**

Selling **for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there from), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she)

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was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11359, 11018.
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Not a Defense. *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel.*

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Lungren v. Peron (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 68–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[e], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.

RELATED ISSUES

Medical Marijuana Not a Defense to Possession for Sale

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of possession for sale under Health and Safety Code section 11359. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra,* 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use]; *People v. Wright* (2004) 121 Cal.App.4th 1356 [18 Cal.Rptr.3d 220], review granted Dec. 1, 2004, S128442 [Supreme Court granted review on issue of whether evidence of compassionate use admissible in case where possession for sale charged].)

(New January 2006)

2353–2359. Reserved for Future Use

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(ii) Transportation or Offering to Transport

2360. Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor

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The defendant is charged [in Count ____] with (giving away/transporting) 28.5 grams or less of marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (gave away/transported) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana was in a usable amount but not more than 28.5 grams in weight.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

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[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (give it away/transport it). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where a defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559]; but see *People v. Young* (2001) 92 Cal.App.4th 229, 237 [111 Cal.Rptr.2d 726].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away 28.5 grams or less of marijuana. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(b).

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- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [g], [3][a], [a.1] (Matthew Bender).

RELATED ISSUES

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. *(Ibid.)* "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . ." (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

Medical Marijuana Not a Defense to Giving Away

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code

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section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

(New January 2006)

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2361. Transporting or Giving Away Marijuana: More Than 28.5 Grams

The defendant is charged [in Count ____] with (giving away/transporting) more than 28.5 grams of marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (gave away/transported) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (give it away/transport it). It is enough if the person has (control

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over it/ [or] the right to control it), either personally or through another person.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559]; but see *People v. Young*

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(2001) 92 Cal.App.4th 229, 237 [111 Cal.Rptr.2d 726].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuana. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].

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- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [g], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Transporting, Giving Away, etc., Not More Than 28.5 Grams of Marijuana. Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor.*

(New January 2006)

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2362. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor

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The defendant is charged [in Count ____] with (offering to give away/offering to transport/attempting to transport) 28.5 grams or less of marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing 28.5 grams or less;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) the controlled substance.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for

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medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559]; but see *People v. Young* (2001) 92 Cal.App.4th 229, 237 [111 Cal.Rptr.2d 726].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7

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Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with offering to transport or give away 28.5 grams or less of marijuana. For transporting or giving away 28.5 grams or less of marijuana, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(b).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g], [j], [3][a], [a.1] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor.*

(New January 2006)

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2363. Offering to Transport or Give Away Marijuana: More Than 28.5 Grams

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The defendant is charged [in Count ____] with (offering to give away/offering to transport/attempting to transport) more than 28.5 grams of marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing more than 28.5 grams;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) the controlled substance.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for

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medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

[The People do not need to prove that the defendant actually possessed the marijuana.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559]; but see *People v. Young* (2001) 92 Cal.App.4th 229, 237 [111 Cal.Rptr.2d 726].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7

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Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of marijuana. For transporting or giving away more than 28.5 grams of marijuana, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g], [j], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Offering to Transport or Giving Away Not More Than 28.5 Grams of Marijuana. Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor.*

(New January 2006)

2364–2369. Reserved for Future Use

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(iii) Planting

2370. Planting, etc., Marijuana

The defendant is charged [in Count ____] with [unlawfully] (planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) one or more marijuana plants;**

AND

2. **The defendant knew that the substance (he/she) (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) was marijuana.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

<Defense: Compassionate Use>

[Possession or cultivation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes[, or as the primary caregiver of a patient with a medical need,] when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a

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reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this charge.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11358. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then also give the bracketed word "unlawfully" in the first paragraph and element 1. If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

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AUTHORITY

- Elements. Health & Saf. Code, § 11358.
- Harvesting. *People v. Villa* (1983) 144 Cal.App.3d 386, 390 [192 Cal.Rptr. 674].
- Aider and Abettor Liability. *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 70, 111.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.

RELATED ISSUES

Aider and Abettor Liability of Landowner

In *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580], the court held that a landowner could be convicted of aiding and abetting cultivation of marijuana based on his or her knowledge of the activity and failure to prevent it. "If [the landowner] knew of the existence of the illegal activity, her failure to take steps to stop it would aid and abet the commission of the crime. This conclusion is based upon the control that she had over her property." *(Ibid.)*

(New January 2006)

2371–2374. Reserved for Future Use

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(iv) Simple Possession

2375. Simple Possession of Marijuana: Misdemeanor

The defendant is charged [in Count ____] with possessing more than 28.5 grams of marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

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[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>

[Possession of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence

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to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11357(c), 11018; *People v.* Palaschak (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [d], [3][a], [a.1] (Matthew Bender).

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2376. Simple Possession of Marijuana on School Grounds: Misdemeanor

The defendant is charged [in Count ____] with possessing marijuana, a controlled substance, on the grounds of a school.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**
5. **The marijuana was in a usable amount but not more than 28.5 grams in weight;**
6. **The defendant was at least 18 years old;**

AND

7. **The defendant possessed the marijuana on the grounds of or inside a school providing instruction in any grade from kindergarten through 12, when the school was open for classes or school-related programs.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks

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(except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Compassionate Use>

[Possession of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) However, there are no cases on whether the defense applies to the charge of possession on school grounds. In general, the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions if the court concludes that the defense applies to possession on school grounds.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. *People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11357(d), 11018; *People v.* Palaschak (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].

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- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

(New January 2006)

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2377. Simple Possession of Concentrated Cannabis

The defendant is charged [in Count ____] with possessing concentrated cannabis, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was concentrated cannabis;**

AND

5. **The controlled substance was in a usable amount.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

***Concentrated cannabis* means the separated resin, whether crude or purified, from the cannabis plant.**

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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<Defense: Compassionate Use>

[Possession of concentrated cannabis is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana or concentrated cannabis for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana or concentrated cannabis possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana or concentrated cannabis for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana or concentrated cannabis.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Defenses—Instructional Duty

"Concentrated cannabis or hashish is included within the meaning of 'marijuana' as the term is used in the Compassionate Use Act of 1996." (86 Ops.Cal.Atty.Gen. 180, 194 (2003)) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

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If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11357(a), 11006.5; *People v.* Palaschak (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

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F. OFFENSES INVOLVING MINORS

(i) Controlled Substances

2380. Sale, Furnishing, etc., of Controlled Substance to Minor

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The defendant is charged [in Count ____] with (selling/furnishing/administering/giving away) _____ <*insert type of controlled substance*>, a controlled substance, to someone under 18 years of age.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (sold/furnished/administered/gave away) a controlled substance to _____ <*insert name of alleged recipient*>;**
2. **The defendant knew of the presence of the controlled substance;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **At that time, the defendant was 18 years of age or older;**
5. **At that time, _____ <*insert name of alleged recipient*> was under 18 years of age;**

[AND]

6. **The controlled substance was _____ <*insert type of controlled substance*>(;/.)**

<Give element 7 when instructing on usable amount; see Bench Notes.>

[AND

7. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging _____ <*insert type of controlled substance*> for money, services, or anything of value.]

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[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (sell it/furnish it/administer it/give it away). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed element 7 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 657] [same].) The bracketed element 7 and the definition of usable amount are provided here for the court to use at its discretion.

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If the defendant is charged with violating Health and Safety Code section 11354(a), in element 4, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 583, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18. *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Administering. Health & Saf. Code, § 11002.
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr. 541].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.02, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [h], [i], [3][a], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Sale to Person Not a Minor. Health & Saf. Code, §§ 11352, 11379.

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- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale of Controlled Substance. Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

RELATED ISSUES

No Defense of Good Faith Belief Over 18

"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454].)

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2381. Offering to Sell, Furnish, etc., Controlled Substance to Minor

The defendant is charged [in Count ____] with offering to (sell/furnish/administer/give away) _____ <*insert type of controlled substance*>, a controlled substance, to someone under 18 years of age.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] offered to (sell/furnish/administer/give away) _____ <*insert controlled substance*>, a controlled substance, to _____ <*insert name of alleged recipient*>;**
2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away) the controlled substance;**
3. **At that time, the defendant was 18 years of age or older;**

AND

4. **At that time, _____ <*insert name of alleged recipient*> was under 18 years of age.**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18. *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Administering. Health & Saf. Code, § 11002.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [h]–[j], [3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Offering to Sell to Person Not a Minor. Health & Saf. Code, §§ 11352, 11360, 11379.
- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale of Controlled Substance. Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541,

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1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

See the Related Issues section to CALCRIM No. 2380, *Sale, Furnishing, etc., of Controlled Substance to Minor*.

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2382. Employment of Minor to Sell Controlled Substance

The defendant is charged [in Count ____] with (hiring/employing/using) someone under 18 years of age to (transport/carry/sell/give away/prepare for sale/peddle) _____ <*insert type of controlled substance*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (hired/employed/used) _____ <*insert name of person hired*>;**
2. **_____ <*insert name of person hired*> was (hired/employed/used) to (transport/carry/sell/give away/prepare for sale/peddle) _____ <*insert type of controlled substance*>, a controlled substance;**
3. **At that time, the defendant was 18 years of age or older;**
4. **At that time, _____ <*insert name of person hired*> was under 18 years of age;**

AND

5. **The defendant knew of the substance's nature or character as a controlled substance.**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/carried/sold/given away/prepared for sale/peddled), only that (he/she) was aware that it was a controlled substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354.
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.12, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [g], [h], [3][a], [b], [c] (Matthew Bender).

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2383. Use of Minor as Agent to Violate Controlled Substance Law

The defendant is charged [in Count ____] with using someone under 18 years of age as an agent to (transport/sell/give away/possess/possess for sale) _____ <*insert type of controlled substance*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used _____ <*insert name of person hired*> as an agent;**
2. **_____ <*insert name of person hired*> was used by the defendant to (transport/sell/give away/possess/possess for sale) _____ <*insert type of controlled substance*>, a controlled substance;**
3. **At that time, the defendant was 18 years of age or older;**
4. **At that time, _____ <*insert name of person hired*> was under 18 years of age;**

AND

5. **The defendant knew of the substance's nature or character as a controlled substance.**

An *agent* is a person who is authorized to act for the defendant in dealings with other people.

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/sold/given away/possessed/possessed for sale), only that (he/she) was aware that it was a controlled substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, § 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Agent. Civ. Code, § 2295.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.12, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [d], [e], [g], [h], [3][a] (Matthew Bender).

(New January 2006)

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2384. Inducing Minor to Violate Controlled Substance Laws

The defendant is charged [in Count ____] with (soliciting/inducing/encouraging/intimidating) someone under 18 years of age to commit the crime of _____ <*insert description of Health and Safety Code violation alleged*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully (solicited/induced/encouraged/intimidated) _____ <*insert name of person solicited*> to commit the crime of _____ <*insert description of Health and Safety Code violation alleged*> [of] _____ <*insert type of controlled substance*>;**
2. **The defendant intended that _____ <*insert name of person solicited*> would commit that crime;**
3. **At that time, the defendant was 18 years of age or older;**

AND

4. **At that time, _____ <*insert name of person solicited*> was under 18 years of age.**

To decide whether the defendant intended that _____ <*insert name of person solicited*> would commit the crime of _____ <*insert description of Health and Safety Code violation alleged*>, please refer to the separate instructions that I (will give/have given) you on that crime.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<*Defense: Good Faith Belief Over 18*>

**[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person solicited*> was 18 years of age or older. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____ <*insert*

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name of person solicited> **was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Where indicated in the instruction, insert a description of the Health and Safety Code violation allegedly solicited. For example, "the crime of possession for sale of cocaine," or "the crime of sale of marijuana."

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

The court has a **sua sponte** duty to give the final bracketed paragraph if there is substantial evidence supporting the defense that the defendant had a reasonable and good faith belief that the person was over 18 years of age. (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting. *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103, 104.

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.12, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [3][a] (Matthew Bender).

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(ii) Marijuana

2390. Sale, Furnishing, etc., of Marijuana to Minor

The defendant is charged [in Count ____] with (selling/furnishing/administering/giving away) marijuana, a controlled substance, to someone under (18/14) years of age.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (sold/furnished/administered/gave away) marijuana, a controlled substance, to _____** *<insert name of alleged recipient>*;
2. **The defendant knew of the presence of the controlled substance;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **At that time, the defendant was 18 years of age or older;**

[AND]

5. **At that time, _____** *<insert name of alleged recipient>* **was under (18/14) years of age;**

<Give element 6 when instructing on usable amount; see Bench Notes.>

[AND

6. **The marijuana was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are

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not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/ gave away), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (sell it/furnish it/administer it/give it away). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 5, give the alternative of "under 14 years of age" only if the defendant is charged with furnishing, administering, or giving away marijuana to a minor under 14. (Health & Saf. Code, § 11361(a).)

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed

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element 6 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 6 and the bracketed definition of usable amount are provided here for the court to use at its discretion.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, § 11361.
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18. *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Administering. Health & Saf. Code, § 11002.
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [h], [i], [3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Sale to Person Not a Minor. Health & Saf. Code, § 11360.
- Simple Possession of Marijuana. Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana. Health & Saf. Code, § 11359.

RELATED ISSUES

No Defense of Good Faith Belief Over 18

"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454].)

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2391. Offering to Sell, Furnish, etc., Marijuana to Minor

The defendant is charged [in Count ____] with offering to (sell/furnish/administer/give away) marijuana, a controlled substance, to someone under (18/14) years of age.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] offered to (sell/furnish/administer/give away) marijuana, a controlled substance, to _____ <*insert name of alleged recipient*>;**
2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away) the controlled substance;**
3. **At that time, the defendant was 18 years of age or older;**

AND

4. **At that time, _____ <*insert name of alleged recipient*> was under (18/14) years of age.**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there from), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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[The People do not need to prove that the defendant actually possessed the marijuana.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 4, give the alternative of "under 14 years of age" only if the defendant is charged with offering to furnish, administer, or give away marijuana to a minor under 14. (Health & Saf. Code, § 11361(a).)

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, § 11361.
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18. *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Administering. Health & Saf. Code, § 11002.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [h]–[j], [3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Offering to Sell to Person Not a Minor. Health & Saf. Code, § 11360.
- Simple Possession of Marijuana. Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana. Health & Saf. Code, § 11359.

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

See the Related Issues section to CALCRIM No. 2390, *Sale, Furnishing, etc., of Marijuana to Minor*.

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2392. Employment of Minor to Sell, etc., Marijuana

The defendant is charged [in Count ____] with (hiring/employing/using) someone under 18 years of age to (transport/carry/sell/give away/prepare for sale/peddle) marijuana, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (hired/employed/used) _____ <*insert name of person hired*>;**
2. **_____ <*insert name of person hired*> was (hired/employed/used) to (transport/carry/sell/give away/prepare for sale/peddle) marijuana, a controlled substance;**
3. **At that time, the defendant was 18 years of age or older;**
4. **At that time, _____ <*insert name of person hired*> was under 18 years of age;**

AND

5. **The defendant knew of the substance's nature or character as a controlled substance.**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/carried/sold/

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given away/prepared for sale/peddled), only that (he/she) was aware that it was a controlled substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, § 11361(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [g], [h], [3][a] (Matthew Bender).

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2393. Inducing Minor to Use Marijuana

The defendant is charged [in Count ____] with inducing someone under 18 years of age to use marijuana.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (encouraged/persuaded/solicited/intimidated/induced) _____ <*insert name of person solicited*> to use marijuana;**
2. **At that time, the defendant was at least 18 years of age or older;**

AND

3. **At that time, _____ <*insert name of person solicited*> was under 18 years of age.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant which is incapable of germination.]]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief Over 18>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person solicited*> was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____ <*insert name of person solicited*> was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

The court has a **sua sponte** duty to give the final bracketed paragraph if there is substantial evidence supporting the defense that the defendant had a reasonable and good faith belief that the person was over 18 years of age. (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].)

AUTHORITY

- Elements. Health & Saf. Code, § 11361(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting. *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [3][a] (Matthew Bender).

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G. USE AND POSSESSION OF PARAPHERNALIA

(i) Use

2400. Using or Being Under the Influence of Controlled Substance

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The defendant is charged [in Count ____] with (using/ [or] being under the influence of) _____ <*insert controlled substance listed in Health & Saf. Code, § 11550*>, a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

<*Alternative A—use of controlled substance*>

1. **The defendant willfully [and unlawfully] used _____ <*insert controlled substance listed in Health & Saf. Code, § 11550*>, a controlled substance[, a short time before (his/her) arrest](;/.)**

[OR]

<*Alternative B—under the influence of controlled substance*>

(1/2). The defendant was willfully [and unlawfully] under the influence of _____ <*insert controlled substance listed in Health & Saf. Code, § 11550*>, a controlled substance, when (he/she) was arrested.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[Someone is *under the influence of a controlled substance* if that person has taken or used a controlled substance that has appreciably affected the person's nervous system, brain, or muscles or has created in the person a detectable abnormal mental or physical condition.]

<*Defense: Prescription*>

**[The defendant is not guilty of (using/ [or] being under the influence of) _____ <*insert controlled substance listed in Health*

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& Saf. Code, § 11550> **if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, [naturopathic doctor] or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

A violation of Health and Safety Code section 11550 based on "use" of a controlled substance requires " 'current use' or 'use immediately prior to arrest' . . . ." (*People v. Jones* (1987) 189 Cal.App.3d 398, 403–404 [234 Cal.Rptr. 408]; see also *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700 [126 Cal.Rptr. 656]; *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [140 Cal.Rptr. 122].) In *People v. Jones, supra,* 189 Cal.App.3d at p. 406, the court found evidence of use within 48 hours prior to the defendant's arrest sufficient. If there is an issue in the case over when the defendant allegedly used the substance, give the bracketed phrase "a short time before (his/her) arrest" in element 1. *(Ibid.)* Alternatively, the court may insert a specific time or time frame in element 1, e.g., "24 to 48 hours prior to (his/her) arrest."

A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

If the court instructs the jury on both use and being under the influence, the court should consider whether a unanimity instruction is required. (See CALCRIM No. 3500, *Unanimity*.)

Defenses—Instructional Duty

The prescription defense is codified in Health and Safety Code section 11550. The defendant need only raise a reasonable doubt about whether his or her use of the drug was lawful because of a valid prescription. (See

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People v. Mower (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. Give the bracketed "and unlawfully" in the elements and the bracketed paragraph on the defense.

AUTHORITY

- Elements. Health & Saf. Code, § 11550.
- Under the Influence. *People v. Culberson* (1956) 140 Cal.App.2d Supp. 959, 960–961 [295 P.2d 598]; see also *People v. Cantry* (2004) 32 Cal.4th 1266, 1278 [14 Cal.Rptr.3d 1, 90 P.3d 1168]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710].
- Under the Influence and Use Distinguished. *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [140 Cal.Rptr. 122].
- Willfulness Element of Offense. *People v. Little* (2004) 115 Cal.App.4th 766, 775 [9 Cal.Rptr.3d 446].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Specific Controlled Substance Must Be Alleged. *People v. Sallas* (1978) 86 Cal.App.3d 737, 743 [150 Cal.Rptr. 543].
- Requires Current Use. *People v. Jones* (1987) 189 Cal.App.3d 398, 403–404 [234 Cal.Rptr. 408]; see also *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700 [126 Cal.Rptr. 656]; *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [140 Cal.Rptr. 122].
- Statute Constitutional. *Bosco v. Justice Court* (1978) 77 Cal.App.3d 179, 191–192 [193 Cal.Rptr. 468].
- Prescription Defense. Health & Saf. Code, § 11550.
- Prescription Defined. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §73.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [k], [l], [2][b] (Matthew Bender).

(Revised August 2006)

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2401. Aiding and Abetting Unlawful Use of Controlled Substance

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The defendant is charged [in Count ____] with aiding and abetting unlawful use of a controlled substance in a place.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and intentionally (visited/ [or] was present in) a place where someone else was (smoking/ [or] using) _____ <*insert controlled substance specified in Health & Saf. Code, § 11365*>, a controlled substance;**
2. **The defendant knew that the other person intended to (smoke/ [or] use) the controlled substance;**
3. **The defendant intended to aid and abet the other person in (smoking/ [or] using) the controlled substance;**
4. **The defendant did or said something that did in fact aid and abet the other person in (smoking/ [or] using) the controlled substance;**

AND

5. **The defendant knew that (his/her) words or conduct aided and abetted the other person in (smoking/ [or] using) the controlled substance.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone *aids and abets* a crime if, before or during the commission of the crime, he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

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[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

2. **He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318] [duty to instruct on aiding and abetting].)

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed portion that begins with "If you conclude that the defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is evidence that the defendant withdrew from participation in the crime, the court has a **sua sponte** duty to instruct on withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].) Give the bracketed portion that begins with "A person who aids and abets a crime is not guilty."

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AUTHORITY

- Elements. Health & Saf. Code, § 11365.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Aiding and Abetting Required. Health. & Saf. Code, § 11365(b); *People v. Cressey* (1970) 2 Cal.3d 836, 848–849 [87 Cal.Rptr. 699, 471 P.2d 19].
- Knowledge and Willful, Intentional Involvement Required. *People v. Brim* (1968) 257 Cal.App.2d 839, 842 [65 Cal.Rptr. 265].
- Requirements for Aiding and Abetting Generally. *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Withdrawal. *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 118.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.10[3]; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [m] (Matthew Bender).

RELATED ISSUES

Drug Use in Car

A car is a "place" for the purposes of this offense. (*People v. Lee* (1968) 260 Cal.App.2d 836, 840–841 [67 Cal.Rptr. 709].)

See also the Related Issues section of CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

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(ii) Possession of Paraphernalia

2410. Possession of Controlled Substance Paraphernalia

The defendant is charged [in Count ____] with possessing an object that can be used to unlawfully inject or consume a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed an object that can be used to unlawfully inject or consume a controlled substance;**
2. **The defendant knew of the object's presence;**

AND

3. **The defendant knew that the object could be used to unlawfully inject or consume a controlled substance.**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant possessed the following items: _____ <*insert each specific item of paraphernalia when multiple items alleged***>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]**

<Defense: Authorized Possession for Personal Use>

[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. **(He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;**

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[AND]

2. (He/She) obtained (it/them) from an authorized source(;/.)

[AND

3. (He/She) possessed no more than 10 (needles/ [or] syringes).]

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Defenses—Instructional Duty

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 121285.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 121285(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) Similarly, in a city or county that has authorized participation in the project, Health and Safety Code section 11364(a) "shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source." (Health & Saf. Code, § 11364(c).) The defendant need only raise a

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reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession of hypodermic is an affirmative defense]); *People v. Mower, ibid.* at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

AUTHORITY

- Elements. Health & Saf. Code, § 11364.
- Statute Constitutional. *People v. Chambers* (1989) 209 Cal.App.3d Supp. 1, 4 [257 Cal.Rptr. 289].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Disease Prevention Demonstration Project. Health & Saf. Code, § 121285; Bus. & Prof. Code, § 4145(a)(2).
- Possession Permitted Under Project. Health & Saf. Code, § 11364(c).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 116.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b] (Matthew Bender).

RELATED ISSUES

Marijuana Paraphernalia Excluded

Possession of a device for smoking marijuana, without more, is not a crime. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897 [132 Cal.Rptr.2d 471].)

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2411. Possession of Hypodermic Needle or Syringe

The defendant is charged [in Count ____] with possessing [a] hypodermic (needle[s]/ [or] syringe[s]).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed [a] hypodermic (needle[s]/ [or] syringe[s]);**
2. **The defendant knew of its presence;**

AND

3. **The defendant knew that the object[s] (was/were) [a] hypodermic (needle[s]/ [or] syringe[s]).**

[Two or more persons may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<Defense: Authorized Possession for Personal Use>

[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. **(He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;**

[AND]

2. **(He/She) obtained (it/them) from an authorized source(;/.)**

[AND

3. **(He/She) possessed no more than 10 (needles/ [or] syringes).]**

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not

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met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Defenses—Instructional Duty

Business and Professions Code section 4140 allows for the lawful possession of a hypodermic needle or hypodermic syringe when "acquired in accordance with this article." (*People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession affirmative defense].) The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *ibid.* at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 121285.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 121285(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) If there is sufficient evidence that the defendant acquired the hypodermic needle or syringe in accordance with this project, the court has a sua sponte duty to instruct on the defense. Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on the defense of authorized possession.

AUTHORITY

- Elements. Bus. & Prof. Code, § 4140.

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- Authorized Possession Defense. *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17]; *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Disease Prevention Demonstration Project. Health & Saf. Code, § 121285; Bus. & Prof. Code, § 4145(a)(2).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.02; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b] (Matthew Bender).

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2412. Fraudulently Obtaining a Hypodermic Needle or Syringe

The defendant is charged [in Count ____] with fraudulently obtaining a hypodermic (needle/ [or] syringe).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant obtained a hypodermic (needle/ [or] syringe);**

AND

2. **To do so, the defendant (used fraud[,]/ [or] used a forged or fictitious name[,]/ [or] violated the law by _____ <*insert description of conduct in violation of statute*>).**

[A person *uses fraud* when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Bus. & Prof. Code, § 4326(a).
- Fraud Defined. See *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a] (Matthew Bender).

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2413. Using or Permitting Improper Use of a Hypodermic Needle or Syringe

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The defendant is charged [in Count ____] with (using[,]/ [or] permitting[,]/ [or] causing) a hypodermic (needle/ [or] syringe) [to be used] for a purpose other than the one for which it had been obtained.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant obtained a hypodermic (needle/ [or] syringe) from someone who had a license to (sell/ [or] furnish) the (needle/ [or] syringe);**

AND

2. **The defendant (used[,]/ [or] permitted[,]/ [or] caused) that hypodermic (needle/ [or] syringe) [to be used] for a purpose other than the one for which it had been obtained.**

[The defendant may have either directly or indirectly caused the hypodermic (needle/ [or] syringe) to be used for a purpose other than the one for which it had been obtained.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Bus. & Prof. Code, § 4326(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a] (Matthew Bender).

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H. MONEY FROM CONTROLLED SUBSTANCES

2430. Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Proceeds

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The defendant is charged [in Count ____] with the unlawful possession of more than $100,000 obtained from a transaction involving a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed more than $100,000 in (cash/ [or]** _____ <*insert type[s] of negotiable instrument[s]*>**;**
2. **The (cash/ [or]** _____ <*insert type[s] of negotiable instrument[s]*>**) (was/were) obtained from the (sale/ possession for sale/transportation/manufacture/offer to sell/ offer to manufacture) [of]** _____ <*insert name[s] of controlled substance[s]*>**, [a] controlled substance[s];**

AND

3. **The defendant knew that the (cash/ [or]** _____ <*insert type[s] of negotiable instrument[s]*>**) (was/were) obtained as a result of the (sale/possession for sale/transportation/ manufacture/offer to sell/offer to manufacture) [of] a controlled substance.**

[In determining whether or not the defendant is guilty of this crime, you may consider, in addition to any other relevant evidence:

[Whether the defendant had paid employment(;/.)]

[The opinion of a controlled substances expert on the source of the (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>**)(;/.)]**

[Documents or ledgers, if any, that show sales of controlled substances.]

You must decide the significance, if any, of this evidence.]

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[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime.

Give the bracketed paragraphs instructing that the jury may consider the defendant's employment, expert testimony, and ledgers if such evidence has been presented. If a controlled substances expert testifies, the court has a **sua sponte** duty to instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.) Give CALCRIM No. 332, *Expert Witness Testimony*.

AUTHORITY

- Elements. Health & Saf. Code, § 11370.6.
- Possession Has Same Meaning as in Drug Possession Cases. *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419, fn. 6 [39 Cal.Rptr.2d 766].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Statute Constitutional. *People v. Mitchell* (1994) 30 Cal.App.4th 783, 793 [36 Cal.Rptr.2d 150]; *People v. Granados* (1993) 16 Cal.App.4th 517, 519 [20 Cal.Rptr.2d 131].
- Instruction on Factor to Consider Constitutional. *People v. Mitchell* (1994) 30 Cal.App.4th 783, 804–811 [36 Cal.Rptr.2d 150].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 122.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[4] (Matthew Bender).

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RELATED ISSUES

No Requirement Defendant Be Involved in Drug Crime

Culpability under Health and Safety Code section 11370.6 does not require that the defendant possess a controlled substance or participate in a transaction involving controlled substances in any manner. (*People v. Mitchell* (1994) 30 Cal.App.4th 783, 797–798 [36 Cal.Rptr.2d 150].) However, the defendant must have knowledge of the origin of the money. (*Id.* at p. 798.)

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2431. Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Money to Purchase

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The defendant is charged [in Count ____] with the unlawful possession of more than $100,000 intended for purchasing a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed more than $100,000 in (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>);**
2. **The defendant intended to use the (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>) to unlawfully purchase _____ <*insert name[s] of controlled substance[s]*>, [a] controlled substance[s];**

AND

3. **The defendant committed an act in substantial furtherance of the purchase.**

[In determining whether or not the defendant is guilty of this crime, you may consider, in addition to any other relevant evidence:

[Whether the defendant had paid employment(;/.)]

[The opinion of a controlled substances expert on the source of the (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>)(;/.)]

[Documents or ledgers, if any, that show sales of controlled substances.]

You must decide the significance, if any, of this evidence.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime.

Give the bracketed paragraphs instructing that the jury may consider the defendant's employment, expert testimony, and ledgers if such evidence has been presented. If a controlled substances expert testifies, the court has a **sua sponte** duty to instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.) Give CALCRIM No. 332, *Expert Witness Testimony*.

AUTHORITY

- Elements. Health & Saf. Code, § 11370.6.
- Possession Has Same Meaning as in Drug Possession Cases. *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419, fn. 6 [39 Cal.Rptr.2d 766].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Statute Constitutional. *People v. Mitchell* (1994) 30 Cal.App.4th 783, 793 [36 Cal.Rptr.2d 150]; *People v. Granados* (1993) 16 Cal.App.4th 517, 519 [20 Cal.Rptr.2d 131].
- Instruction on Factor to Consider Constitutional. *People v. Mitchell* (1994) 30 Cal.App.4th 783, 804–811 [36 Cal.Rptr.2d 150].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 122.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[4] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2430, *Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Proceeds*.

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2432. Attorney's Possession of More Than $100,000 Related to Transaction Involving Controlled Substance

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The defendant is charged [in Count ____] with being an attorney who knowingly accepted more than $100,000 from a client who obtained it from a transaction involving a controlled substance.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (is/was) an attorney;**
2. **The defendant accepted a fee of more than $100,000 in (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>) for representing a client in a criminal investigation or proceeding;**
3. **The (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>) (was/were) obtained from the (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture) [of] _____ <*insert name[s] of controlled substance[s]*>, [a] controlled substance[s];**
4. **The defendant knew that the (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>) (was/were) obtained from the (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture) of the controlled substance;**

AND

<A. Intent to Participate>

5A. [The defendant accepted the (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>) with the intent to participate in the client's (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture) [of] a controlled substance(;/.)]

[OR

<B. Intent to Disguise Source>

5B.][The defendant accepted the money with the intent to disguise or aid in disguising the source of the funds or the nature of the criminal activity.]

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An *attorney* is someone licensed by [the] (California State Bar/ _____ <*insert name of licensing state or country*>) to practice law.

[In determining whether or not the defendant is guilty of this crime, you may consider, in addition to any other relevant evidence:

[Whether the defendant had paid employment(;/.)]

[The opinion of a controlled substances expert on the source of the (cash/ [or] _____ <*insert type[s] of negotiable instrument[s]*>)(;/.)]

[Documents or ledgers, if any, that show sales of controlled substances.]

You must decide the significance, if any, of this evidence.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime.

When an attorney is charged with unlawful possession of drug proceeds, the prosecution must prove the additional element that the attorney intended to aid the illegal activity or to disguise the source of the funds. (Health & Saf. Code, § 11370.6(b); *People v. Granados* (1993) 16 Cal.App.4th 517, 519 [20 Cal.Rptr.2d 131].) Give either optional paragraph A, B, or both, depending on the charged crime and the evidence proffered at trial.

Give the bracketed paragraphs instructing that the jury may consider the defendant's employment, expert testimony, and ledgers if such evidence has been presented. If a controlled substances expert testifies, the court has a **sua sponte** duty to instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.) Give CALCRIM No. 332, *Expert Witness Testimony*.

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AUTHORITY

- Elements. Health & Saf. Code, § 11370.6(b).
- Possession Has Same Meaning as in Drug Possession Cases. *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419, fn. 6 [39 Cal.Rptr.2d 766].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Statute Constitutional. *People v. Mitchell* (1994) 30 Cal.App.4th 783, 793 [36 Cal.Rptr.2d 150]; *People v. Granados* (1993) 16 Cal.App.4th 517, 519 [20 Cal.Rptr.2d 131].
- Instruction on Factor to Consider Constitutional. *People v. Mitchell* (1994) 30 Cal.App.4th 783, 804–811 [36 Cal.Rptr.2d 150].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 122.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 1, *The California Defense Advocate,* § 1.12[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* §§ 145.01[4], 145.01A[5] (Matthew Bender).

(New January 2006)

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I. OTHER RELATED OFFENSES

2440. Maintaining a Place for Controlled Substance Sale or Use

---

The defendant is charged [in Count ____] with (opening/ [or] maintaining) a place for the (sale/ [or] use) of a (controlled substance/ [or] narcotic drug).

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (opened/ [or] maintained) a place;

AND

2. The defendant (opened/ [or] maintained) the place with the intent to (sell[,]/ [or] give away[,]/ [or] use[,]/ [or] allow others to use) a (controlled substance/ [or] narcotic drug), specifically _____ <*insert name of drug*>, on a continuous or repeated basis at that place.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, § 11366.
- Purpose Must Be Continuous or Repetitive Use of Place for Illegal Activity. *People v. Horn* (1960) 187 Cal.App.2d 68, 72 [9 Cal.Rptr. 578]; *People v. Holland* (1958) 158 Cal.App.2d 583, 588–589 [322 P.2d 983].
- Jury Must Be Instructed on Continuous or Repeated Use. *People v. Shoals* (1992) 8 Cal.App.4th 475, 490 [10 Cal.Rptr.2d 296].
- "Opening" and "Maintaining" Need Not Be Defined. *People v. Hawkins* (2004) 124 Cal.App.4th 675, 684 [21 Cal.Rptr.3d 500].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 118.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][n] (Matthew Bender).

RELATED ISSUES

Corpus Delicti Includes Intent

"[T]he perpetrator's purpose of continuously or repeatedly using a place for selling, giving away, or using a controlled substance is part of the corpus delicit of a violation of Health and Safety Code section 11366." (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 681 [21 Cal.Rptr.3d 500].)

(New January 2006)

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2441. Use of False Compartment to Conceal Controlled Substance

---

The defendant is charged [in Count ____] with ((possessing/using/controlling)/ [or] (designing/constructing/building/altering/fabricating/insalling/attaching)) a false compartment with the intent to (store/conceal/smuggle/transport) a controlled substance in a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

<A. Possessed, Used, Controlled>

1. **[The defendant (possessed/used/controlled) a false compartment with the intent to (store/conceal/smuggle/transport) a controlled substance in the false compartment in a vehicle(;/.)]**

[OR

<B. Designed, Built, etc.>

2. **][The defendant (designed/constructed/built/altered/fabricated/installed/attached) a false compartment (for/in/to) a vehicle with the intent to (store/conceal/smuggle/transport) a controlled substance in it.]**

A *false compartment* is any box, container, space, or enclosure intended or designed to (conceal[,]/hide[,]/ [or] [otherwise] prevent discovery of) any controlled substance within or attached to a vehicle. A false compartment may be ((a/an) (false/modified/altered) fuel tank[,]/original factory equipment of a vehicle that is (modified/altered/changed)[,]/ [or] a compartment, space, or box that is added to, or made or created from, existing compartments, spaces, or boxes within a vehicle).

A *vehicle* includes any car, truck, bus, aircraft, boat, ship, yacht, or vessel.

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to

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possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give either optional paragraph A, B, or both, depending on the charged crime and the evidence proffered at trial.

AUTHORITY

- Elements. Health & Saf. Code, § 11366.8.
- False Compartment Does Not Require Modification. *People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1414 [11 Cal.Rptr.3d 434].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 117.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][o] (Matthew Bender).

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WEAPONS

A. POSSESSION OF ILLEGAL OR DEADLY WEAPON

2500. Illegal Possession, etc., of Weapon

2501. Carrying Concealed Explosive or Dirk or Dagger

2502. Possession, etc., of Switchblade Knife

2503. Possession of Deadly Weapon With Intent to Assault

2504–2509. Reserved for Future Use

B. POSSESSION OF FIREARM BY PERSON PROHIBITED

2510. Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction

2511. Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction

2512. Possession of Firearm by Person Prohibited by Court Order

2513. Possession of Firearm by Person Addicted to a Narcotic Drug

2514. Possession of Firearm by Person Prohibited by Statute: Self-Defense

2515–2519. Reserved for Future Use

C. CARRYING A FIREARM

(i) Concealed

2520. Carrying Concealed Firearm on Person

2521. Carrying Concealed Firearm Within Vehicle

2522. Carrying Concealed Firearm: Caused to Be Carried Within Vehicle

2523–2529. Reserved for Future Use

(ii) Loaded

2530. Carrying Loaded Firearm

2531–2539. Reserved for Future Use

(iii) Sentencing Factors

2540. Carrying Firearm: Specified Convictions

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2541. Carrying Firearm: Stolen Firearm

2542. Carrying Firearm: Active Participant in Criminal Street Gang

2543. Carrying Firearm: Not in Lawful Possession

2544. Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness

2545. Carrying Loaded Firearm: Not Registered Owner

2546. Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded

2547–2559. Reserved for Future Use

D. ASSAULT WEAPONS

2560. Possession, etc., of Assault Weapon or .50 BMG Rifle

2561. Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged as Separate Count and as Enhancement

2562. Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged Only as Enhancement

2563–2569. Reserved for Future Use

E. EXPLOSIVES AND DESTRUCTIVE DEVICES

2570. Possession of Destructive Device

2571. Carrying or Placing Explosive or Destructive Device on Common Carrier

2572. Possession of Explosive or Destructive Device in Specified Place

2573. Possession, Explosion, etc., of Explosive or Destructive Device With Intent to Injure or Damage

2574. Sale or Transportation of Destructive Device

2575. Offer to Sell Destructive Device

2576. Explosion of Explosive or Destructive Device With Intent to Murder

2577. Explosion of Explosive or Destructive Device Causing Bodily Injury

2578. Explosion of Explosive or Destructive Device Causing Death, Mayhem, or Great Bodily Injury

2579. Possession of Materials to Make Destructive Device or Explosive

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F. OTHER WEAPONS OFFENSES

2590. Armed Criminal Action

2591. Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Conviction or Mental Illness

2592. Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Court Order

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A. POSSESSION OF ILLEGAL OR DEADLY WEAPON

2500. Illegal Possession, etc., of Weapon

The defendant is charged [in Count ____] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending) a weapon, specifically (a/an) _____ <*insert type of weapon from Pen. Code, § 12020(a)*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent) (a/an) _____ <*insert type of weapon from Pen. Code, § 12020(a)*>;**
2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the _____ <*insert type of weapon from Pen. Code, § 12020(a)*>;**

[AND]

<Alternative 3A—object capable of innocent uses>

[3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the object as a weapon. When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be

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used for a dangerous, rather than a harmless, purpose.(;/.)]

<Alternative 3B—object designed solely for use as weapon>

[3. The defendant knew that the object (was (a/an) _____ *<insert type of weapon from Pen. Code, § 12020(a), e.g., "cane sword," short-barreled shotgun>***/could be used** _____ *<insert description of weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense">***).]**

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND

4. The defendant intended to sell it.]

<Give only if alternative 3B is given.>

[The People do not have to prove that the defendant intended to use the object as a weapon.]

(A/An) _____ *<insert type of weapon from Pen. Code, § 12020(a)>* **means** _____ *<insert appropriate definition from Pen. Code, § 12020(c)>***.**

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[(A/An) _____ *<insert prohibited firearm from Pen. Code, § 12020(a)>* **does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed/manufactured/ caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: _____ *<insert description of each weapon when multiple items alleged>*. **You may not find the defendant guilty unless all of you agree**

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that the People have proved that the defendant (possessed/ manufactured/caused to be manufactured/imported/kept for sale/ offered or exposed for sale/gave/lent) at least one of these weapons and you all agree on which weapon (he/she) (possessed/ manufactured/caused to be manufactured/imported/kept for sale/ offered or exposed for sale/gave/lent).]

<Defense: Statutory Exemptions>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/ give/lend) (a/an) _____ <*insert type of weapon from Pen. Code, § 12020(a)*> if _____ <*insert exception from Pen. Code, § 12020(b)*>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/ manufactured/caused to be manufactured/imported/kept for sale/ offered or exposed for sale/gave/lent) (a/an) _____ <*insert type of weapon from Pen. Code, § 12020(a)*>. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, insert one of the following weapons from Penal Code section 12020(a):

Firearms
short-barreled shotgun
short-barreled rifle
undetectable firearm
firearm that is not immediately recognizable as a firearm
unconventional pistol
cane gun, wallet gun, or zip gun

Firearm Equipment and Ammunition
camouflaging firearm container
ammunition that contains or consists of any fléchette dart

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bullet containing or carrying an explosive agent
multiburst trigger activator
large-capacity magazine

Knives and Swords
ballistic knife
belt buckle knife
lipstick case knife
cane sword
shobi-zue
air gauge knife
writing pen knife

Martial Arts Weapons
nunchaku
shuriken

Other Weapons
metal knuckles
leaded cane
metal military practice handgrenade or metal replica handgrenade
instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed "as a weapon." (*People v. Fannin, supra,* 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object "has no conceivable innocent function" (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in Penal Code section 12020(c) (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

Following the elements, insert the appropriate definition of the alleged weapon from Penal Code section 12020(c). Subdivision (c) defines all the terms used in subdivision (a), *except* the following:

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"firearm which is not immediately recognizable as a firearm" (no cases on meaning but see definition of firearm in Penal Code, § 12001(b));

"bullet containing or carrying an explosive agent" (see *People v. Lanham* (1991) 230 Cal.App.3d 1396, 1400 [282 Cal.Rptr. 62], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]);

"metal military practice handgrenade or metal replica handgrenade" (no cases on meaning); and

"instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag" (see *People v. Fannin, supra,* 91 Cal.App.4th at p. 1402 [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons]).

For any of the weapons not defined in subdivision (c), use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully . . . ." (see Pen. Code, § 12020(b)).

AUTHORITY

- Elements. Pen. Code, § 12020(a)(1) & (2).
- Definitions. Pen. Code, §§ 12020(c), 12001.
- Exemptions. Pen. Code, § 12020(b).

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- Need Not Prove Intent to Use. *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required. *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon. *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 113 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon. *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable. *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun. *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart. *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 161.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

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COMMENTARY

Element 3—Knowledge

"Intent to use a weapon is not an element of the crime of weapon possession." (People v. Fannin (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].) However, interpreting Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that "[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object "as a weapon." (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra,* 92 Cal.App.4th at p. 547, for example, the court considered the possession of "metal knuckles," defined in Penal Code section 12020(c)(7) as an object "worn for purposes of offense or defense." The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that "the instrument may be used for purposes of offense or defense." (*Id.* at p. 547.)

Similarly, in *People v. Taylor, supra,* 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that "[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword."

Finally, *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a "slungshot." The court held that "if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*." (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)

Prior to *People v. Rubalcava, supra,* 23 Cal.4th 322, some cases held that the prosecution did not have to prove that the defendant knew that the

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object was a weapon of a prohibited class. (*People v. Lanham* (1991) 230 Cal.App.3d 1396, 1401–1405 [282 Cal.Rptr. 62] [exploding bullets—need not know exploding]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [263 Cal.Rptr. 301] [sawed-off shotgun—need not know "sawed-off"]; *People v. Azevedo* (1984) 161 Cal.App.3d 235, 240 [207 Cal.Rptr. 270] [same].) The Supreme Court has questioned the continuing validity of these holdings in light of its holding in *Rubalcava*. (*In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].) This issue is currently pending before the Supreme Court. (*People v. King* (Dec. 17, 2004, S129052) 2004 DJDAR 14927.)

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M*. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shot-gun was "sawed off" but that failure to give instruction was harmless if error].)

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2501. Carrying Concealed Explosive or Dirk or Dagger

The defendant is charged [in Count ____] with unlawfully carrying a concealed (explosive/dirk or dagger).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried on (his/her) person (an explosive/a dirk or dagger);**
2. **The defendant knew that (he/she) was carrying it;**
3. **It was substantially concealed on the defendant's person;**

AND

4. **The defendant knew that it (was an explosive/could readily be used as a stabbing weapon).**

The People do not have to prove that the defendant used or intended to use the alleged (explosive/dirk or dagger) as a weapon.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) that is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> is an *explosive*.]

[A *dirk or dagger* is a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. *Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A (pocketknife/nonlocking folding knife/folding knife that is not prohibited by Penal Code section 653k) is not a *dirk or dagger* unless the blade of the knife is exposed and locked into position.]

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[A knife carried in a sheath and worn openly suspended from the waist of the wearer is not *concealed*.]

<Give only if object may have innocent uses.>

[When deciding whether the defendant knew the object (was an explosive/could be used as a stabbing weapon), consider all the surrounding circumstances, including the time and place of possession. Consider also (the destination of the defendant[,]/ the alteration of the object from standard form[,]) and other facts, if any.]

[The People allege that the defendant carried the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant carried at least one of these weapons and you all agree on which weapon (he/she) carried and when (he/she) carried it.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Give the bracketed paragraph that begins with "When deciding whether" only if the object was not designed solely for use as a stabbing weapon but may have innocent uses. (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

When instructing on the meaning of "explosive," if the explosive is listed in Health and Safety Code section 12000, the court may use the bracketed sentence stating, "_____ is an explosive." For example, "Nitroglycerine is an explosive." However, the court may not instruct the

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jury that the defendant used an explosive. For example, the court may not state, "The defendant used an explosive, nitroglycerine," or "The substance used by the defendant, nitroglycerine, was an explosive." (See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257]; *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].)

If the court gives the instruction on a "folding knife that is not prohibited by Penal Code section 653k," give a modified version of CALCRIM No. 2502, *Possession, etc., of Switchblade Knife.*

AUTHORITY

- Elements. Pen. Code, § 12020(a)(3) & (4).
- Need Not Prove Intent to Use. *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Knowledge Required. *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Substantial Concealment. *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885].
- Explosive Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [789 P.2d 127, 268 Cal.Rptr. 399].
- Dirk or Dagger Defined. Pen. Code, § 12020(c)(24).
- Dirk or Dagger—No Length Requirement. *In re Victor B.* (1994) 24 Cal.App.4th 521, 526 [29 Cal.Rptr.2d 362].
- Dirk or Dagger—Object Not Originally Designed as Knife. *In re Victor B.* (1994) 24 Cal.App.4th 521, 525–526 [29 Cal.Rptr.2d 362].
- Dirk or Dagger—Capable of Ready Use. *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782].
- Dirk or Dagger—Pocketknives. *In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656 [105 Cal.Rptr.2d 905]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [80 Cal.Rptr.2d 868].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 162.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][a] (Matthew Bender).

RELATED ISSUES

Knowledge Element

"[T]he relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52].) However, "to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' (§ 12020(a), (c)(24).) A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020." (*Id.* at pp. 331–332 [emphasis in original].)

Definition of Dirk or Dagger

The current definition of "dirk or dagger" contained in Penal Code section 12020(c)(24) was enacted in 1995 and amended in 1997. Prior decisions interpreting the meaning of "dirk or dagger" should be viewed with caution. (See *People v. Mowatt* (1997) 56 Cal.App.4th 713, 719–720 [65 Cal.Rptr.2d 722] [comparing old and new definitions]; *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782] [same]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [80 Cal.Rptr.2d 868] [discussing 1997 amendment].)

Dirk or Dagger—"Capable of Ready Use"

"[T]he 'capable of ready use' requirement excludes from the definition of dirk or dagger a device carried in a configuration that requires assembly before it can be utilized as a weapon." (*People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782].)

Dirk or Dagger—"Pocketknife"

"Although they may not have folding blades, small knives obviously designed to be carried in a pocket in a closed state, and which cannot be used until there have been several intervening manipulations, comport with the implied legislative intent that such knives do not fall within the definition of proscribed dirks or daggers but are a type of pocketknife

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excepted from the statutory proscription." (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656 [105 Cal.Rptr.2d 905].)

(New January 2006)

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2502. Possession, etc., of Switchblade Knife

The defendant is charged [in Count ____] with unlawfully (possessing in a vehicle/carrying on (his/her) person/selling/offering or exposing for sale/giving/lending/transferring) a switchblade knife.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed in the (passenger's/ [or] driver's) area of a motor vehicle in a (public place/place open to the public)/carried on (his/her) person/sold/offered or exposed for sale/gave/lent/transferred) a switchblade knife [to another person];**
2. **The blade of the knife was two or more inches long;**
3. **The defendant knew that (he/she) (possessed/carried/sold/offered or exposed for sale/gave/lent/transferred) it [to another person];**

[AND]

4. **The defendant knew that it had the characteristics of a switchblade(;/.)**

<Give element 5 only if defendant is charged with offering or exposing for sale.>

[AND

5. **The defendant intended to sell it.]**

A *switchblade* knife is a knife that looks like a pocketknife and has a blade that can be released automatically by a flick of a button, pressure on the handle, flip of the wrist or other mechanical device, or is released by the weight of the blade or any other mechanism. A *switchblade* includes a spring-blade knife, snap-blade knife, gravity knife, or any other similar type knife. A *switchblade* knife does not include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade, if the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade or that biases the blade back toward its closed position.

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[The *(passenger's/ [or] driver's) area* means that part of a motor vehicle that is designed to carry the (driver/ [and] passengers), including the interior compartment or space within.]

The People do not have to prove that the defendant used or intended to use the alleged switchblade knife as a weapon.

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed in a vehicle/ carried/sold/offered or exposed for sale/gave/lent/transferred) the following switchblade knives: _____ <*insert description of each knife when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed in a vehicle/carried/sold/ offered or exposed for sale/gave/lent/transferred) at least one of these knives which was a switchblade and you all agree on which switchblade knife (he/she) (possessed in a vehicle/carried/sold/ offered or exposed for sale/gave/lent/transferred).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following switchblade knives," inserting the items alleged.

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AUTHORITY

- Elements. Pen. Code, § 653k.
- Need Not Prove Intent to Use. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Mendoza* (1967) 251 Cal.App.2d 835, 842–843 [60 Cal.Rptr. 5].
- Knowledge Required. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Specific Intent Required for Offer to Sell. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6, [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 172.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][a] (Matthew Bender).

RELATED ISSUES

Butterfly and Tekna® Knives Included

Butterfly and Tekna knives are prohibited switchblades under Penal Code section 653k. (*People ex rel. Mautner v. Quattrone* (1989) 211 Cal.App.3d 1389, 1395 [260 Cal.Rptr. 214].)

Broken-Spring Knife

Where the spring mechanism on the knife did not work, the court found insufficient evidence that the knife was a prohibited switchblade under Penal Code section 653k. (*In re Roderick S.* (1981) 125 Cal.App.3d 48, 52 [177 Cal.Rptr. 800].)

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Public Place

On the meaning of "public place," see *In re Danny H.* (2002) 104 Cal.App.4th 92, 98 [128 Cal.Rptr.2d 222], discussing the meaning of public place in Penal Code section 594.1. See also CALCRIM No. 2966, *Disorderly Conduct: Under the Influence in Public*, and cases cited therein.

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2503. Possession of Deadly Weapon With Intent to Assault

The defendant is charged [in Count ____] with possessing a deadly weapon with intent to assault.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a deadly weapon on (his/her) person;**
2. **The defendant knew that (he/she) possessed the weapon;**

AND

3. **At the time the defendant possessed the weapon, (he/she) intended to assault someone.**

A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term *deadly weapon* is defined in another instruction to which you should refer.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] and any other evidence that indicates that the object would be used for a dangerous, rather than a harmless, purpose.]

The term *application of force* means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

[The People allege that the defendant possessed the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Give the definition of deadly weapon unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed paragraph that begins with "In deciding whether" if the object is not a weapon as a matter of law but is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].)

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The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

AUTHORITY

- Elements. Pen. Code, § 12024.
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Objects With Innocent Uses. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Knowledge Required. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Assault. Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 140.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1] (Matthew Bender).

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B. POSSESSION OF FIREARM BY PERSON PROHIBITED

2510. Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction

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The defendant is charged [in Count ____] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm;**
2. **The defendant knew that (he/she) (owned/purchased/ received/ possessed) the firearm;**

[AND]

3. **The defendant had previously been convicted of (a felony/ two offenses of brandishing a firearm/the crime of _____** *<insert misdemeanor offense from Pen. Code, § 12021(c) or Pen. Code, § 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***(;/.)**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 12021(c).>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 12021(e).>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

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[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[A *juvenile court finding* is the same as a conviction.]

[A conviction of _____ <*insert name of offense from other state or federal offense*> is the same as a conviction for a felony.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing defendant's credibility*>]. Do not consider such evidence for any other purpose.]

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ <*insert description of each firearm when multiple firearms alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]

<*Defense: Momentary Possession*>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**
2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm.**

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The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.]

<Defense: Justifiable Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant does not

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stipulate to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant stipulates, use CALCRIM No. 2511, *Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction*. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 250, *Union of Act and Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should only be given if the defendant is charged under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be

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given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, §§ 12021(a), (b), (c) & (e), 12021.1(a), 12001.6; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 12021(h).
- Presenting Evidence of Prior Conviction to Jury. *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].

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- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense. *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

RELATED ISSUES

Proof of Prior Conviction

The trial court "has two options when a prior conviction is a substantive element of a current charge: Either the prosecution proves each element of the offense to the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without specifying the nature of the felony committed." (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].)

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Lack of Knowledge of Status of Conviction Not a Defense

"[R]egardless of what she reasonably believed, or what her attorney may have told her, defendant was deemed to know under the law that she was a convicted felon forbidden to possess concealable firearms. Her asserted mistake regarding her correct legal status was a mistake of law, not fact. It does not constitute a defense to section 12021." (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].)

Out-of-State Convictions

For an out-of-state conviction, it is sufficient if the offense is a felony under the laws of the "convicting jurisdiction." (*People v. Shear* (1999) 71 Cal.App.4th 278, 283 [83 Cal.Rptr.2d 707].) The prosecution does not have to establish that the offense would be a felony under the laws of California. *(Ibid.)* Even if the convicting jurisdiction has restored the defendant's right to possess a firearm, the defendant may still be convicted of violating Penal Code section 12021. *(Ibid.)*

Pardons and Penal Code Section 1203.4 Motions

A pardon pursuant to Penal Code section 4852.17 restores a person's right to possess a firearm unless the person was convicted of a "felony involving the use of a dangerous weapon." (Pen. Code, § 4852.17.) The granting of a Penal Code section 1203.4 motion, however, does not restore the person's right to possess any type of firearm. (Pen. Code, § 1203.4(a); *People v. Frawley* (2000) 82 Cal.App.4th 784, 796 [98 Cal.Rptr.2d 555].)

Submitting False Application for Firearm

A defendant who submitted a false application to purchase a firearm may not be prosecuted for "attempted possession of a firearm by a felon." (*People Duran* (2004) 124 Cal.App.4th 666, 673 [21 Cal.Rptr.3d 495].) "Instead, the felon may only be prosecuted pursuant to the special statute, [Penal Code section] 12076, which expressly proscribes such false application." *(Ibid.)*

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2511. Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction

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The defendant is charged [in Count ____] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm;**
2. **The defendant knew that (he/she) (owned/purchased/ received/possessed) the firearm;**

[AND]

3. **The defendant had previously been convicted of (a/two) (felony/misdemeanor[s])(;/.)**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 12021(c).>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 12021(e).>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person).]

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The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of (a/two) (felony/ misdemeanor[s]). This stipulation means that you must accept this fact as proved.

[Do not consider this fact for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>**]. Do not speculate about or discuss the nature of the conviction.]**

[The People allege that the defendant (owned/purchased/received/ possessed) the following firearms: _____ <*insert description of each firearm when multiple firearms alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<*Defense: Momentary Possession*>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**
2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

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<Defense: Justifiable Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant stipulates to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant does not stipulate, use CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

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If the defendant has stipulated to the fact of the conviction, the court should sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.) If the defendant agrees, the court should not read the portion of the information describing the nature of the conviction. Likewise, the court should ensure that the verdict forms do not reveal the nature of the conviction.

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 250, *Union of Act and Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should only be given if the defendant is charged under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Do not consider this fact for any other purpose. . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting

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instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, §§ 12021(a), (b), (c) & (e), 12021.1(a), 12001.6; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 12021(h).
- Presenting Evidence of Prior Conviction to Jury. *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].

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- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense. *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

RELATED ISSUES

See CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction.*

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2512. Possession of Firearm by Person Prohibited by Court Order

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The defendant is charged [in Count ____] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm;**
2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

[AND]

3. **A court had ordered that the defendant not (own/purchase/receive/possess) a firearm(;/.)**

<Give element 4 only if the defendant is charged under Pen. Code, § 12021(g).>

[AND

4. **The defendant knew of the court's order.]**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The defendant and the People have stipulated, or agreed, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm. This stipulation means that you must accept this fact as proved.]

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<Alternative A—limiting instruction when stipulation to order>

[Do not consider this fact for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>]. Do not speculate about why the court's order was made.]

<Alternative B—limiting instruction when no stipulation to order>

[You may consider evidence, if any, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing defendant's credibility*>]. Do not consider such evidence for any other purpose.]

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ <*insert description of each firearm when multiple firearms alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]

<Defense: Momentary Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**
2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence,

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the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) had given prior notice to the agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant is charged under Penal Code section 12021(d)(1), possession by someone prohibited as a condition of probation following conviction for a crime not listed in

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other provisions of Penal Code section 12021, or Penal Code section 12021(g), possession by someone prohibited by a temporary restraining order or other protective order.

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 250, *Union Of Act And Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Give element 4 only if the defendant is charged under Penal Code section 12021(g).

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant has not stipulated to the probation order, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ."

If the defendant does stipulate to the probation order, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ." The court must also sanitize all references to the probation order to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp,* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant agrees, the court must not read the portion of the information describing the nature of the conviction.

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Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the probation condition. (*People v. Valentine, supra,* 42 Cal.3d at 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].) If the defendant does not stipulate to the probation condition, give alternative A. If the defendant does stipulate, give alternative B.

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1064].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, § 12021(d) & (g); *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 12021(h).

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- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1] (Matthew Bender).

(New January 2006)

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2513. Possession of Firearm by Person Addicted to a Narcotic Drug

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The defendant is charged [in Count ____] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm;**
2. **The defendant knew that (he/she) (owned/purchased/ received/ possessed) the firearm;**

AND

3. **At the time the defendant (owned/purchased/received/ possessed) the firearm, (he/she) was addicted to the use of a narcotic drug.**

_____ <*insert narcotic drug alleged*> **is a narcotic drug.**

A person is *addicted* to the use of a narcotic drug if:

1. **The person has become emotionally dependent on the drug in the sense that he or she experiences a compulsive need to continue its use;**
2. **The person has developed a tolerance to the drug's effects and therefore requires larger and more potent doses;**

AND

3. **The person has become physically dependent, suffering withdrawal symptoms if he or she is deprived of the drug.**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Two or more people may possess something at the same time.]

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[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (owned/purchased/received/ possessed) the following firearms: _____ <*insert description of each firearm when multiple firearms alleged*>. **You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<*Defense: Momentary Possession*>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**
2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<*Defense: Justifiable Possession*>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/ she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

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1. (He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);

[AND]

2. (He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)

[AND

3. If the defendant was transporting the firearm to a law enforcement agency, the defendant gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 251, *Union of Act and Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

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If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 26, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, § 12021(a); *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].

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- Narcotic Addict. *People v. O'Neil* (1965) 62 Cal.2d 748, 754 [44 Cal.Rptr. 320, 401 P.2d 928].
- Defense of Justifiable Possession. Pen. Code, § 12021(h).
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

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2514. Possession of Firearm by Person Prohibited by Statute: Self-Defense

The defendant is not guilty of unlawful possession of a firearm[, as charged in Count ____,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/someone else/_____ <*insert name of third party*>) was in imminent danger of suffering significant or substantial physical injury;**
2. **The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;**
3. **A firearm became available to the defendant without planning or preparation on (his/her) part;**
4. **The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;**
5. **No other means of avoiding the danger of injury was available;**

AND

6. **The defendant's use of the firearm was reasonable under the circumstances.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/ herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and

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appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <*insert name of person who allegedly threatened defendant*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <*insert name of person who allegedly threatened defendant*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of person who was the alleged source of the threat*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under Pen. Code, § 12021].)

If this instruction is given with other self-defense instructions, the court should delete from the other instructions any portion stating that the defendant need not retreat. (*People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 589 P.2d 1000] [if defendant is a convicted felon, he or she is obliged to try to retreat before using a firearm in self-defense].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats or assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

Related Instructions

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide).*

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor.*

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CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived.*

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another.*

AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense. *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 589 P.2d 1000].
- Possession Must Be Brief and Not Planned. *People v. McLindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].
- Instructional Requirements. *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance. Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Reasonable Belief. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[1][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

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C. CARRYING A FIREARM

(i) Concealed

2520. Carrying Concealed Firearm on Person

The defendant is charged [in Count ____] with unlawfully carrying a concealed firearm on (his/her) person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried on (his/her) person a firearm capable of being concealed on the person;**
2. **The defendant knew that (he/she) was carrying a firearm;**

AND

3. **It was substantially concealed on the defendant's person.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

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<Defense: Statutory Exemption>

[The defendant did not unlawfully carry a concealed firearm if _____ <*insert defense from Pen. Code, § 12025.5, 12026, 12026.1, 12026.2, or 12027*>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 12025(b), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The court should give the bracketed definition of "firearm capable of being concealed on the person" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 12025(a) prohibits carrying a concealed "pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

Defenses—Instructional Duty

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 12025.5, 12026, 12026.1, 12026.2, and 12027. If sufficient evidence has been presented to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

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Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.

CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.

CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.

CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.

CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.

CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.

CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements. Pen. Code, § 12025(a)(2) & (f).
- Firearm Defined. Pen. Code, § 12001.
- Knowledge Required. *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required. *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Justifications and Exemptions. Pen. Code, §§ 12025.5, 12026, 12026.1, 12026.2, 12027.
- Need Not Be Operable. *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment. *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague. *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 12025(b)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

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2521. Carrying Concealed Firearm Within Vehicle

The defendant is charged [in Count ____] with unlawfully carrying a concealed firearm within a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried within a vehicle a firearm capable of being concealed on the person;**
2. **The defendant knew the firearm was in the vehicle;**
3. **The firearm was substantially concealed within the vehicle;**

AND

4. **The vehicle was under the defendant's control or direction.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

<Defense: Statutory Exemption>

[The defendant did not unlawfully carry a concealed firearm with in a vehicle if _____ *<insert defense from Pen. Code,*

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§ 12025.5, 12026, 12026.1, 12026.2, or 12027>**. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 12025(b), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The court should give the bracketed definition of "firearm capable of being concealed on the person" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 12025(a) prohibits carrying a concealed "pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

Defenses—Instructional Duty

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 12025.5, 12026, 12026.1, 12026.2, and 12027. If sufficient evidence has been presented to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

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Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.

CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.

CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.

CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.

CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.

CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.

CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements. Pen. Code, § 12025(a)(1) & (f).
- Firearm Defined. Pen. Code, § 12001.
- Knowledge Required. *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required. *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Justifications and Exemptions. Pen. Code, §§ 12025.5, 12026, 12026.1, 12026.2, 12027.
- Need Not Be Operable. *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment. *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague. *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 12025(b)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Gun in Unlocked Carrying Case Is Concealed

"If a firearm is transported in a vehicle in such a manner as to be invisible unless its carrying case is opened, it is concealed in the ordinary and usual meaning of the term." (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].) Thus, carrying a firearm in an unlocked case in a vehicle violates Penal Code section 12025(a)(1). *(Ibid.)* However, Penal Code section 12026.1 makes it lawful to transport a firearm in a vehicle if it is in a *locked* case.

Not Necessary for Defendant to Possess or Control the Firearm

"The statute does not require that the defendant have the exclusive possession and control of the firearm." (*People v. Davis* (1958) 157 Cal.App.2d 33, 36 [320 P.2d 88].) The court in *People v. Davis, supra*, upheld the conviction where the defendant owned and controlled the vehicle and knew of the presence of the firearm below the seat, even though the weapon was placed there by someone else and belonged to someone else. *(Ibid.)*

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2522. Carrying Concealed Firearm: Caused to Be Carried Within Vehicle

The defendant is charged [in Count ____] with unlawfully causing a firearm to be carried concealed within a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant caused a firearm capable of being concealed on the person to be concealed while it was carried within a vehicle;**
2. **The defendant knew that (he/she) caused the firearm to be concealed in the vehicle;**
3. **The firearm was substantially concealed within the vehicle;**

AND

4. **The defendant was in the vehicle during the time the firearm was concealed there.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

[The People do not need to prove that the defendant initially brought the firearm into the vehicle.]

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<Defense: Statutory Exemption>

[The defendant did not unlawfully cause a firearm to be carried concealed within a vehicle if _____ <*insert defense from Pen. Code, § 12025.5, 12026, 12026.1, 12026.2, or 12027*>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully caused a firearm to be carried concealed within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 12025(b), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The court should give the bracketed definition of "firearm capable of being concealed on the person" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 12025(a) prohibits carrying a concealed "pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

Defenses—Instructional Duty

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 12025.5, 12026, 12026.1, 12026.2, and 12027. If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

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Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.

CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.

CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.

CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.

CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.

CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.

CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements. Pen. Code, § 12025(a)(3) & (f).
- Firearm Defined. Pen. Code, § 12001.
- Knowledge Required. *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required. *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Justifications and Exemptions. Pen. Code, §§ 12025.5, 12026, 12026.1, 12026.2, 12027.
- Need Not Be Operable. *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment. *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague. *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 12025(b)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Defendant Need Not Bring Firearm Into Car

"Appellant caused the gun to be carried concealed in a vehicle in which he was an occupant, by concealing the gun between the seats. His conduct fits the language and purpose of the statute. The prosecution was not required to prove that appellant initially brought the gun into the car." (*People v. Padilla* (2002) 98 Cal.App.4th 127, 134 [119 Cal.Rptr.2d 457].)

(New January 2006)

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(ii) Loaded

2530. Carrying Loaded Firearm

The defendant is charged [in Count ____] with unlawfully carrying a loaded firearm (on (his/her) person/in a vehicle).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried a loaded firearm (on (his/her) person/in a vehicle);**
2. **The defendant knew that (he/she) was carrying a firearm;**

AND

3. **At that time, the defendant was in a public place or on a public street in (an incorporated city/in an unincorporated area where it was unlawful to discharge a firearm).**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of any explosion or other form of combustion. [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm* is defined in another instruction.]

As used here, a firearm is *loaded* if there is an unexpended cartridge or shell in the firing chamber or in either a magazine or clip attached to the firearm. An *unexpended cartridge or shell* consists of a case that holds a charge of powder and a bullet or shot. [A *muzzle-loader firearm is loaded* when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

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[_____ <*insert location*> is (an incorporated city/in an unincorporated area where it is unlawful to discharge a firearm).]

<Defense: Statutory Exemption>

[The defendant did not unlawfully carry a loaded firearm if _____ <*insert defense from Pen. Code, § 12031(b), (h)–(l)*>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a loaded firearm. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 12031(a)(2), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Defenses—Instructional Duty

Exemptions and a justification for carrying a loaded firearm are stated in Penal Code section 12031(b) and (h) to *(l).* If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

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Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions.*

CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm.*

CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang.*

CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession.*

CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness.*

CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner.*

CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded.*

AUTHORITY

- Elements. Pen. Code, § 12031(a).
- Firearm Defined. Pen. Code, § 12001.
- Knowledge of Presence of Weapon Required. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Dillard* (1984) 154 Cal.App.3d 261, 267 [201 Cal.Rptr. 136].
- Knowledge Firearm Loaded Not Required. *People v. Dillard* (1984) 154 Cal.App.3d 261, 266 [201 Cal.Rptr. 136]; *People v. Harrison* (1969) 1 Cal.App.3d 115, 120 [81 Cal.Rptr. 396].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Justifications and Exemptions. Pen. Code, § 12031(b), (h)–(*l*).
- Need Not Be Operable. *People v. Taylor* (1984) 151 Cal.App.3d 432, 437 [199 Cal.Rptr. 6].
- "Loaded" Firearm. *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Must Be in Incorporated City or Prohibited Area of Unincorporated Territory. *People v. Knight* (2004) 121 Cal.App.4th 1568, 1575 [18 Cal.Rptr.3d 384].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 185–186.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d], [f] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 12031(a)(2)(G).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Loaded Firearm

"Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

Location—Court May Take Judicial Notice

"The location of local streets within city boundaries is properly a matter of judicial notice [citation omitted], as is the fact that a particular jurisdiction is an incorporated city." (*People v. Vega* (1971) 18 Cal.App.3d 954, 958 [96 Cal.Rptr. 391] [footnote and citation omitted].)

Taser®

"[A] Taser is a firearm and can be a loaded firearm within section 12031." (*People v. Heffner* (1977) 70 Cal.App.3d 643, 652 [139 Cal.Rptr. 45].)

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(iii) Sentencing Factors

2540. Carrying Firearm: Specified Convictions

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ____], you must then decide whether the People have proved the additional allegation that (he/she) was previously convicted of (a felony/the crimes of _____ <*insert one or more weapons offenses punishable as a felony, crimes against the person or property, or narcotics and dangerous drug violations*>). It has already been determined that the defendant is the person named in exhibits _____ <*insert numbers or descriptions of exhibits*>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <*insert code section alleged*>**, on** _____ <*insert date of conviction*>**, in the** _____ <*insert name of court*>**, in Case Number** _____ <*insert docket or case number*>**(;/.)**

[AND <*Repeat for each prior conviction alleged*>**.]**

[A conviction of _____ <*insert name of offense from other state or federal offense*> **is the same as a conviction for a felony.]**

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing credibility of the defendant*>**]. Do not consider this evidence for any other purpose.]**

[You must consider each alleged conviction separately.] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden [for

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any alleged conviction], you must find that the alleged conviction has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Hall* (1998) 67 Cal.App.4th128, 135 [78 Cal.Rptr.2d 809].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(1), 12025(b)(5), 12031(a)(2)(A), or 12031(a)(2)(E), unless the court has granted a bifurcated trial on the prior conviction or the defendant stipulates to the prior conviction. (*People v. Hall, supra,* 67 Cal.App.4th at p. 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, or carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the court grants bifurcation, do not give this instruction. Give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the defendant does stipulate to the prior conviction, this instruction should not be given and the prior conviction should not be disclosed to the jury unless the court admits it as otherwise relevant. (*People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Consider the evidence presented . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th1137, 1139 [2 Cal.Rptr.3d 380].)

AUTHORITY

- Factors. Pen. Code, §§ 12025(b)(1), 12025(b)(5), 12031(a)(2)(A), 12031(a)(2)(E).

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- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

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2541. Carrying Firearm: Stolen Firearm

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ____], you must then decide whether the People have proved the additional allegation that the firearm was stolen.

To prove this allegation, the People must prove that:

1. **The firearm the defendant (carried/ [or] caused to be carried concealed in a vehicle) was stolen;**

AND

2. **The defendant knew or had reasonable cause to believe the firearm was stolen.**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(2) or 12031(a)(2)(B) and the defendant does not stipulate to the firearm being stolen. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, or carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that the firearm was stolen, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

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AUTHORITY

- Factors. Pen. Code, §§ 12025(b)(2), 12031(a)(2)(B).
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

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2542. Carrying Firearm: Active Participant in Criminal Street Gang

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If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ____], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

1. **When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**
2. **When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**
2. **That has, as one or more of its primary activities, the commission of _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)*>;**

AND

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3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or]
conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25)>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>*;

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25)>*

AND

[at least one of the following crimes:] _____ *<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>*;

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions or were personally committed by two or more persons.

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's

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primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

***Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]: _____ <*insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted*>.**

To decide whether a member of the gang [or the defendant] committed _____ <*insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(30) inserted in definition of pattern of criminal gang activity*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

To prove that the defendant willfully assisted, furthered, or promoted a crime, the People must prove that:

1. **A member of the gang committed the crime**;
2. **The defendant knew that the gang member intended to commit the crime;**
3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the commission of the crime.**

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact

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in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

2. **He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176] [Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(3) or 12031(a)(2)(C) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135

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[78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra,* 26 Cal.4th 316, 323–324.)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "criminal street gang," "pattern of criminal gang activity," or "felonious criminal conduct."

On request, give the bracketed paragraph that begins with "The People do not need to prove that the defendant devoted all or a substantial part of . . . ." (See Pen. Code, § 186.22(i).)

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On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with "If you conclude that defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*.

For additional instructions relating to liability as an aider and abettor, see series 400, Aiding and Abetting.

AUTHORITY

- Factors. Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C).
- Elements of Gang Factor. Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].

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- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Active Participation Defined. Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28, 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* §§ 144.01[1][d], 144.03[2] (Matthew Bender).

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

> [The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action. . . . ¶. . . [The gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

(*Ibid.* [emphasis in original].)

See also the Commentary and Related Issues sections of the Bench Notes for CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

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2543. Carrying Firearm: Not in Lawful Possession

The People have also alleged that the defendant did not lawfully possess the firearm at issue in this case. If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ____], you must then decide whether the People have proved this additional allegation.

To prove this allegation, the People must prove that the defendant did not lawfully possess the firearm.

A person *lawfully possesses a firearm* if he or she either lawfully owns the firearm or has the permission of (the lawful owner/ [or] a person who otherwise has apparent authority over the firearm). A person does not have lawful possession of a firearm if he or she takes it without the permission of the lawful owner or custodian of the firearm.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(4) or 12031(a)(2)(D) and the defendant does not stipulate to unlawful possession. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, or carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

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If the defendant does stipulate to unlawful possession, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

AUTHORITY

- Factors. Pen. Code, §§ 12025(b)(2), 12031(a)(2)(D).
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

(New January 2006)

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2544. Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness

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If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ____], you must then decide whether the People have proved the additional allegation that the defendant was prohibited by law from possessing a firearm.

To prove this allegation, the People must prove that:

<Alternative 1A—prohibited due to mental illness or SVP status>

[The defendant _____ *<insert description from Welf. & Inst. Code, § 8100 or 8103>***.]**

<Alternatives 1B & 2B—prohibited by court order. Give both elements 1B and 2B in cases involving restraining orders. For probation orders, give only 1B.>

[1. A court had ordered that the defendant not (own/ purchase/ receive/ [or] possess) a firearm(;/.)]

[AND

2. The defendant knew about the court's order.]

<Alternatives 1C & 2C—prohibited due to conviction. Give both elements 1C and 2C in cases involving misdemeanor convictions or juvenile findings. For all other cases involving prior convictions, give 1C only.>

[1. The defendant had previously been convicted of (a felony/ two offenses of brandishing a firearm/the crime of _____ *<insert misdemeanor offense from Pen. Code, § 12021(c) or 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***(;/.)]**

[AND

2. (The previous conviction was within 10 years of the date the defendant (carried the firearm/caused the firearm to be carried concealed in a vehicle)./The defendant was less

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than 30 years old at the time (he/she) (carried the firearm/ caused the firearm to be carried concealed in a vehicle).)]

[A juvenile court finding is the same as a conviction.]

[A conviction of _____ <*insert name of offense from other state or federal offense*> is the same as a conviction for a felony.]

[You may consider evidence, if any, that (the defendant was previously convicted of a crime/a court ordered the defendant not to (own[,]/ purchase[,]/ receive[,]/ [or] possess) a firearm) only in deciding whether the People have proved this allegation [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing defendant's credibility*>]. Do not consider such evidence for any other purpose.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(4) or 12031(a)(2)(D) and the defendant does not stipulate that he or she is prohibited from possessing a firearm. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2521, 2522, or carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is prohibited from possessing a firearm, this instruction should not be given and that information should not be disclosed to the jury unless the court admits the information as otherwise relevant. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

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When giving alternative 1B, only give element 2B if the prosecution alleges that the defendant was prohibited from possessing a firearm under Penal Code section 12021(g).

When giving alternative 1C, only give element 2C if the prosecution alleges that the defendant was prohibited from possessing a firearm under Penal Code section 12021(c), possession within ten years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

AUTHORITY

- Factors. Pen. Code, §§ 12025(b)(4), 12031(a)(2)(D).
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

RELATED ISSUES

See Related Issues section of Bench Notes for CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction.*

(New January 2006)

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2545. Carrying Loaded Firearm: Not Registered Owner

If you find the defendant guilty of unlawfully carrying a loaded firearm [under Count ____], you must then decide whether the People have proved the additional allegation that the defendant was not the registered owner of the firearm.

To prove this allegation, the People must prove that the defendant is not listed with the Department of Justice as the registered owner of the firearm.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12031(a)(2)(F) and the defendant does not stipulate that he or she was not the registered owner. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she was not the registered owner, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

AUTHORITY

- Factors. Pen. Code, § 12031(a)(2)(F).
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

(New January 2006)

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2546. Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)/causing a firearm to be carried concealed within a vehicle) [under Count[s] ____], you must then decide whether the People have proved the additional allegation that the defendant was not the registered owner of the firearm and (the firearm was loaded/the defendant possessed the firearm with ammunition).

To prove this allegation, the People must prove that:

1. **The defendant is not listed with the Department of Justice as the registered owner of the firearm;**

AND

<Alternative 2A—firearm loaded>

[2. The firearm was loaded.]

<Alternative 2B—ammunition nearby>

[2. The firearm and unexpended ammunition capable of being discharged from that firearm were either in the defendant's immediate possession or readily accessible to (him/her).]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(6) and the defendant does not stipulate that the firearm was loaded or possessed with ammunition and that he or she was not the

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registered owner. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521 or 2522. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate to this sentencing factor, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

AUTHORITY

- Factors. Pen. Code, § 12025(b)(6).
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

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2547–2559. Reserved for Future Use

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D. ASSAULT WEAPONS

2560. Possession, etc., of Assault Weapon or .50 BMG Rifle

The defendant is charged [in Count ____] with unlawfully (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) (an assault weapon, specifically [a/an] _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*>**/a .50 BMG rifle).**

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) (an assault weapon, specifically [a/an]** _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*>**/a .50 BMG rifle);**
2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) it;**

AND

3. **The defendant knew or reasonably should have known that it had characteristics that made it (an assault weapon/a .50 BMG rifle).**

[(A/An) _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*> **is an *assault weapon*.]**

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base of the cartridge to the tip of the bullet;**

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2. The bullet diameter for the cartridge is from .510 to, and including, .511 inch;

AND

3. The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) at least one of these weapons, and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent).]

<Defense: Permit, Registration, or Exemption From Statute>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/distribute/transport/import/keep for sale/offer or expose for sale/give/lend) (an assault weapon/a .50 BMG rifle) if (he/she) (had registered the weapon/had a valid permit to (possess/manufacture/sell) the weapon/_____ <*insert exemption from Pen. Code, § 12280(e)–(s)*>). The People have the burden of proving beyond a reasonable doubt that the defendant did not (register the weapon/have a valid permit to (possess/manufacture/sell) the weapon/_____ <*insert exemption from Pen. Code, § 12280(e)–(s)*>). If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following weapons," inserting the items alleged. But see Pen. Code, § 12280(a)(3), which states that except in case of a first violation involving not more than two firearms, if more than one assault weapon or .50 BMG rifle is involved in any violation of this section, there shall be a distinct and separate offense for each.

The jury must decide if the weapon possessed was an assault weapon or a .50 BMG rifle. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) When instructing on the definition of assault weapon or .50 BMG rifle, the court should not state that the weapon possessed by the defendant was an assault weapon or was a .50 BMG rifle. In the case of an assault weapon, where indicated in the instruction, the court may insert a weapon listed in Penal Code section 12276 or a description of a weapon from section 12276.1. In the case of a .50 BMG rifle, give the bracketed definition of that term.

If the defendant is charged with both a separate count and an enhancement for violating Penal Code section 12280 while committing another crime, give this instruction and CALCRIM No. 2561, *Possession, etc., of Assault or .50 BMG Rifle Weapon While Committing Other Offense: Pen. Code, § 12280—Charged as Separate Count and as Enhancement*. (Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281].) If the defendant is only charged with an enhancement under Penal Code section 12280(d) and not with a separate count for violating Penal Code section 12280, give only CALCRIM No. 2562, *Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged Only as Enhancement*.

Defenses—Instructional Duty

Registration and permitting procedures are contained in Penal Code sections 12285 to 12287. Exemptions to the statute are stated in Penal Code section

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12280(e) to (s). The existence of a statutory exemption is an affirmative defense. (*People v. Jimenez, supra,* 8 Cal.App.4th at pp. 395–397.) If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for his or her actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

AUTHORITY

- Elements. Pen. Code, § 12280(a)(1) & (2).
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1; see also *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142–1145 [108 Cal.Rptr.2d 445, 25 P.3d 649] [discussing statutory definition of assault weapon, amendments to statute and petition procedure by which the Attorney General may have weapon listed].
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Permits and Registration. Pen. Code, §§ 12285–12287.
- Exemptions. Pen. Code, § 12280(e)–(s).
- Knowledge Required. *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Permits, Registration, and Exemptions Are Affirmative Defenses. *People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397 [10 Cal.Rptr.2d 281].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Statute Constitutional. *Silviera v. Lockyer* (2002) 312 F.3d 1052, 1056; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478 [97 Cal.Rptr.2d 334, 2 P.3d 581].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 165–166.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][b], [d] (Matthew Bender).

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2561. Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged as Separate Count and as Enhancement

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If you find the defendant guilty of both (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) (an assault weapon/a .50 BMG rifle) under Count ____ and the crime of _____ <*insert other offense alleged*> under Count ____, you must then decide whether the People have proved the additional allegation that (he/she) committed the first crime while committing the second one.

To prove this allegation, the People must prove that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) (an assault weapon/a .50 BMG rifle) while committing the crime of _____ <*insert other offense alleged*>.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281] [enhancement under Pen. Code, § 12280 must be pleaded and proved].)

Give this instruction if the defendant is charged with a separate count for violating Penal Code section 12280 and an enhancement for violating Penal Code section 12280 while committing another crime. (Pen. Code, § 12280(d); *People v. Jimenez, supra,* 8 Cal.App.4th at p. 398.) This instruction **must** be given with CALCRIM No. 2560, *Possession, etc., of Assault Weapon or .50 BMG Rifle*, and the appropriate instruction defining the elements of the other offense charged.

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The court must provide the jury with a verdict form on which the jury will indicate if the sentencing enhancement has been proved.

If the defendant is not charged with a separate count for violating Penal Code section 12280 but is charged only with the enhancement, do not give this instruction. Give CALCRIM No. 2562, *Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged Only as Enhancement*.

AUTHORITY

- Enhancement. Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][b] (Matthew Bender).

(New January 2006)

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2562. Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged Only as Enhancement

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If you find the defendant guilty of the crime of _____ <*insert other offense alleged*> [under Count ____], you must then decide whether the People have proved the additional allegation that (he/she) committed that offense while unlawfully (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) (an assault weapon, specifically [a/an] _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*>/a .50 BMG rifle).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) (an assault weapon, specifically [a/an] _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*>/a .50 BMG rifle);**
2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) it;**
3. **The defendant knew or reasonably should have known that it had characteristics that made it (an assault weapon/a .50 BMG rifle);**

AND

4. **The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the weapon while committing the crime of _____ <*insert other offense alleged*>.**

[(A/An) _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*> is an *assault weapon*.]

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[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base to the tip of the bullet;**
2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

AND

3. **The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find this additional allegation true unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) at least one of these weapons, and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent).]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

<*Defense: Permit, Registration, or Exemption From Statute*>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/distribute/transport/import/keep for sale/offer or expose for sale/give/lend) (an assault weapon/a .50 BMG rifle) if

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(he/she) (had registered the weapon/had a valid permit to (possess/manufacture/sell) the weapon/_____ <*insert exemption from Pen. Code, § 12280(e)–(s)*>). The People have the burden of proving beyond a reasonable doubt that the defendant did not (register the weapon/have a valid permit to (possess/manufacture/sell) the weapon/_____ <*insert exemption from Pen. Code, § 12280(e)–(s)*>). If the People have not met this burden, you must find the defendant not guilty of this allegation.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt]; *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281] [enhancement under Pen. Code, §12280 must be pleaded and proved].)

Give this instruction if the defendant is charged with an enhancement for violating Penal Code section 12280 while committing another crime but is not charged with a separate count for violating Penal Code section 12280. (Pen. Code, § 12280(d); *People v. Jimenez, supra,* 8 Cal.App.4th at p. 398.) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing enhancement has or has not been proved.

If the defendant has been charged with a separate count for violating Penal Code section 12280 and with the enhancement, do not give this instruction. Give CALCRIM No. 2561, *Possession, etc., of Assault Weapon or .50 BMG Rifle While Committing Other Offense: Pen. Code, § 12280—Charged as Separate Count and as Enhancement*.

If the prosecution alleges under a single enhancement that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following weapons," inserting the items alleged. But see Pen. Code, § 12280(a)(3), which states that except in case

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of a first violation involving not more than two firearms, if more than one assault weapon or .50 BMG rifle is involved in any violation of this section, there shall be a distinct and separate offense for each.

The jury must decide if the weapon possessed was an assault weapon or .50 BMG rifle. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) When instructing on the definition of assault weapon or .50 BMG rifle, the court should not state that the weapon possessed by the defendant was an assault weapon or was a .50 BMG rifle. In the case of an assault weapon, where indicated in the instruction, the court may insert a weapon listed in Penal Code section 12276 or a description of a weapon from section 12276.1. In the case of a .50 BMG rifle, give the bracketed definition of that term.

Defenses—Instructional Duty

Registration and permitting procedures are contained in Penal Code sections 12285 to 12287. Exemptions to the statute are stated in Penal Code section 12280(e) to (s). The existence of a statutory exemption is an affirmative defense. (*People v. Jimenez, supra,* 8 Cal.App.4th at pp. 395–397.) If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully. . . ."

AUTHORITY

- Enhancement. Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [10 Cal.Rptr.2d 281].
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1; see also *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142–1145 [108 Cal.Rptr.2d 445, 25 P.3d 649] [discussing statutory definition of assault weapon, amendments to statute and petition procedure by which the Attorney General may have weapon listed].
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Permits and Registration. Pen. Code, §§ 12285–12287.
- Exemptions. Pen. Code, § 12280(e)–(s).
- Knowledge Required. *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].

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- Permits, Registration, and Exemptions Are Affirmative Defenses. *People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397 [10 Cal.Rptr.2d 281].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Statute Constitutional. *Silviera v. Lockyer* (2002) 312 F.3d 1052, 1056; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478 [97 Cal.Rptr.2d 334, 2 P.3d 581].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 165–166.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][b] (Matthew Bender).

(Revised August 2006)

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E. EXPLOSIVES AND DESTRUCTIVE DEVICES

2570. Possession of Destructive Device

The defendant is charged [in Count ____] with unlawfully possessing a destructive device.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a destructive device;**
2. **The defendant knew (he/she) possessed it;**

AND

3. **The defendant knew that what (he/she) possessed was a destructive device.**

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>**.]**

[_____ <*insert type of destructive device from Pen. Code, § 12301*> **is a *destructive device*.]**

[The term *destructive device* is defined in another instruction.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant possessed the following destructive devices: _____ <*insert description of each destructive device when multiple devices alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged devices, and you all agree on which alleged device (he/she) possessed.]**

<*Defense: Permit*>

[The defendant did not unlawfully possess a destructive device if (he/she) had a valid permit to do so. The People have the burden

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of proving beyond a reasonable doubt that the defendant did not have a valid permit. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following destructive devices," inserting the items alleged.

Give the bracketed definition of "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

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Defenses—Instructional Duty

Penal Code section 12305 allows for the possession of a destructive device with a permit. The existence of a valid permit is an affirmative defense. (*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629 [154 Cal.Rptr. 314].) The defendant bears the burden of producing evidence of a valid permit. If there is sufficient evidence to raise a reasonable doubt about the existence of a permit, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].)

AUTHORITY

- Elements. Pen. Code, § 12303.
- Destructive Device Defined. Pen. Code, § 12301.
- Permit Exemption. Pen. Code, § 12305; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–628 [154 Cal.Rptr. 314].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 629 [154 Cal.Rptr. 314].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

RELATED ISSUES

Tracer Ammunition

Penal Code section 12301 states that "destructive device" includes "that which is commonly known as tracer or incendiary ammunition, except

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tracer ammunition manufactured for use in shotguns." In *People v. Miller* (1999) 69 Cal.App.4th 190, 213 [81 Cal.Rptr.2d 410], the court held that "proof of the purpose for which tracer ammunition was manufactured is an affirmative defense to the charge of possessing a destructive device, and not an element of the offense."

(New January 2006)

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2571. Carrying or Placing Explosive or Destructive Device on Common Carrier

The defendant is charged [in Count ____] with (carrying/ [or] placing) (an explosive/ [or] a destructive device) on (a/an) (common carrier/boat/plane/car/bus/_____/_____ <*insert type of other vehicle*>) that transports paying passengers.

To prove that the defendant is guilty of this crime, the People must prove that:

<*Alternative 1A—carried or placed on common carrier*>

[1. The defendant willfully (carried/ [or] placed) (an explosive/ [or] a destructive device) on (a/an) (common carrier/boat/plane/car/bus/_____ <*insert type of other vehicle*>) that transports paying passengers;]

<*Alternative 1B—carried or placed in baggage while on common carrier*>

[1. The defendant willfully (carried/ [or] placed) (an explosive/ [or] a destructive device) in (hand baggage[,]/ a roll[,]/ (or another/a) container) while on board (a/an) (common carrier/boat/plane/car/bus/_____ <*insert type of other vehicle*>) that transports paying passengers;]

<*Alternative 1C—placed in baggage to be checked on common carrier*>

[1. The defendant willfully placed (an explosive/ [or] a destructive device) in baggage that was later checked with a common carrier;]

AND

2. The defendant knew that the object that (he/she) (carried/ [or] placed) was (an explosive/ [or] a destructive device).

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly

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combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> is an *explosive*.]

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>.]

[_____ <*insert type of destructive device from Pen. Code, § 12301*> is a *destructive device*.]

[The term[s] (*explosive/* [and] *destructive device*) (is/are) defined in another instruction.]

[A *common carrier* is a person or business that publicly offers to carry persons, property, or messages. [A person or business that publicly offers to carry only telegraphic messages is not a common carrier.]]

[_____ <*insert type or name of common carrier*> is a *common carrier*.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the

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court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

Similarly, in the definition of "common carrier," the court may instruct generally that a type of vehicle is a common carrier. For example, "a Greyhound bus is a common carrier." The court may not instruct that the particular vehicle in the case was a common carrier. For example, the court may not instruct that "the defendant was on a common carrier, a Greyhound bus," or "the vehicle in this case, a Greyhound bus, is a common carrier."

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

AUTHORITY

- Elements. Pen. Code, § 12303.1.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303.

RELATED ISSUES

Gasoline Not an Explosive

"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127] [gasoline, by its nature, not an explosive even where used to ignite a fire].)

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2572. Possession of Explosive or Destructive Device in Specified Place

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The defendant is charged [in Count ____] with recklessly or maliciously possessing (an explosive/ [or] a destructive device) (in[,]/ on[,]/ [or] near) _____ <*insert type of place alleged from Pen. Code, § 12303.2*>.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant recklessly or maliciously possessed (an explosive/ [or] a destructive device);**

AND

2. **At the time the defendant possessed the (substance/ [or] device), (he/she) was**

<2A.>

[on a public street or highway](;[or]/.)

<2B.>

[in or near a (theater[,]/ hall[,]/ school[,]/ college[,]/ church[,]/ hotel[,]/ [or] other public building/ [or] private habitation](;[or]/.)

<2C.>

[in, on, or near a (plane[,]/ passenger train[,]/ car[,]/ cable road or cable car[,]/ boat carrying paying passengers)](; or/.)

<2D.>

[in, on, or near another public place ordinarily passed by human beings].

A person acts *recklessly* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk, (2) he or she ignores that risk, and (3) the person's behavior is grossly different from what a reasonable person would have done in the same situation.

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Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> **is an *explosive*.]**

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>**.]**

[_____ <*insert type of destructive device from Pen. Code, § 12301*> **is a *destructive device*.]**

[The term[s] (*explosive*/ [and] *destructive device*) (is/are) defined in another instruction.]

[The People do not need to prove that the (explosive/ [or] destructive device) was set to explode.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant possessed the following (explosive[s]/ [or] destructive device[s]): _____ <*insert description of each explosive or destructive device when multiple items alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged items and you all agree on which alleged item (he/she) possessed.]**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following," inserting the items alleged. The jury does not have to be unanimous about whether the defendant acted recklessly or maliciously. *(Ibid.)* The jury also does not have to agree on whether the item was an explosive or a destructive device. (*People v. Westoby* (1976) 63 Cal.App.3d 790, 797 [134 Cal.Rptr. 97]; see also *People v. Quinn*, (1976) 57 Cal.App.3d 251, 257 [129 Cal.Rptr. 139] [a bomb may be an explosive and may be a destructive device].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow

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up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

AUTHORITY

- Elements. Pen. Code, § 12303.2.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.
- Recklessly Defined. *People v. Heideman* (1976) 58 Cal.App.3d 321, 334 [130 Cal.Rptr. 349]; *In re Steven S.* (1994) 25 Cal.App.4th 598, 614–615 [31 Cal.Rptr.2d 644]; Model Pen. Code, § 2.02(2)(c).
- Maliciously Defined. Pen. Code, § 7(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101]; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335 [130 Cal.Rptr. 349].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].
- Unanimity. *People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

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RELATED ISSUES

Need Not Be Set to Explode

"One need not possess a destructive device already set to explode in order to violate Penal Code section 12303.2." (*People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].) Thus, the defendant in *Westoby* was guilty of possessing a destructive device even though the battery wires were not connected on the pipe bomb. *(Ibid.)* Similarly, in *People v. Heideman* (1976) 58 Cal.App.3d 321, 335–336 [130 Cal.Rptr. 349], the defendant was guilty of illegally possessing dynamite even though he did not have the blasting caps necessary to ignite the dynamite. (See also *People v. Morse* (1992) 2 Cal.App.4th 620, 646–647 [3 Cal.Rptr.2d 343] [instruction on this point proper].)

Felony Murder

Penal Code section 12303.2 is an inherently dangerous felony supporting a conviction for second degree felony murder. (*People v. Morse* (1992) 2 Cal.App.4th 620, 646 [3 Cal.Rptr.2d 343].) However, in *People v. Morse*, the trial court erred in instructing that if the jury convicted the defendant of second degree murder on the basis of felony murder, the murder was then elevated to first degree murder based on the use of a destructive device. (*Id.* at pp. 654–655.)

Multiple Charges Based on Multiple Explosives or Destructive Devices

The defendant may be charged with multiple counts of violating Penal Code section 12303.2 based on possession of multiple explosives or destructive devices. (*People v. DeGuzman* (2003) 113 Cal.App.4th 538, 548 [6 Cal.Rptr.3d 739].)

Maliciously—People v. Heideman

In *People v. Heideman* (1976) 58 Cal.App.3d 321 [139 Cal.Rptr. 349], the defendant offered to commit murder for hire using explosives and possessed the explosives. (*Id.* at pp. 327–329.) The defendant asserted that he did not actually intend to physically injure anyone but simply to defraud the individuals offering to pay for the murders. (*Id.* at pp. 330–331.) On appeal, the defendant contended that the court had improperly instructed on the meaning of "recklessness," which the prosecution conceded. (*Id.* at p. 334.) Noting that the "[d]efendant admitted that his purpose in storing the dynamite in his room was to carry out a nefarious scheme to defraud his victims," the court found sufficient evidence to establish malice. (*Id.* at p.

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335.) The court stated that under the facts of the case before it, the term "maliciously" did not "require an actual intent to physically injure, intimidate or terrify others." *(Ibid.)* Accordingly, the court found that the error in the instruction on "recklessness" was harmless given that there was sufficient evidence to support the higher culpability standard of malice. *(Ibid.)* The committee did not incorporated the language from *Heideman* in the definition of "maliciously" in this instruction because the committee concluded that this case reflects unique facts and that the language quoted is dicta, not essential to the ruling of the case.

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier*.

(New January 2006)

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2573. Possession, Explosion, etc., of Explosive or Destructive Device With Intent to Injure or Damage

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The defendant is charged [in Count ____] with (possessing/ [or] exploding/ [or] igniting/ [or] attempting to (explode/ [or] ignite)) (an explosive/ [or] a destructive device) with intent (to injure, intimidate, or terrify another person/ [or] to wrongfully damage or destroy someone else's property).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/ [or] exploded/ [or] ignited/ [or] attempted to (explode/ [or] ignite)) (an explosive/ [or] a destructive device);**

AND

2. **At the time the defendant acted, (he/she) intended (to injure, intimidate, or terrify another person/ [or] to wrongfully damage or destroy someone else's property).**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> **is an *explosive*.]**

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>**.]**

[_____ <*insert type of destructive device from Pen. Code, § 12301*> **is a *destructive device*.]**

[The term[s] (*explosive/* [and] *destructive device*) (is/are) defined in another instruction.]

[Two or more people may possess something at the same time.]

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[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed/ [or] exploded/ [or] ignited/ [or] attempted to (explode/ [or] ignite)) the following (explosive[s]/ [or] destructive device[s]): _____ <*insert description of each explosive or destructive device when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/ [or] exploded/ [or] ignited/ [or] attempted to (explode/ [or] ignite)) at least one of the alleged items, and you all agree on which alleged item (he/she) (possessed/ [or] exploded/ [or] ignited/ [or] attempted to (explode/ [or] ignite)).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following," inserting the items alleged. The jury also does not have to agree on whether the item was an explosive or a destructive device. (*People v. Westoby* (1976) 63 Cal.App.3d 790, 797 [134 Cal.Rptr. 97]; see also *People v. Quinn*, (1976) 57 Cal.App.3d 251, 257 [129 Cal.Rptr. 139] [a bomb may be an explosive and may be a destructive device].)

If the prosecution alleges that the defendant attempted to explode or ignite the item, the court **must** also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case

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involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

AUTHORITY

- Elements. Pen. Code, § 12303.3.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.
- Must Intend to Harm Another Person. *People v. Godwin* (1995) 31 Cal.App.4th 1112, 1118 [37 Cal.Rptr.2d 708].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].
- Unanimity. *People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier* and CALCRIM No. 2572, *Possession of Explosive or Destructive Device in Specified Place*.

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2574. Sale or Transportation of Destructive Device

The defendant is charged [in Count ____] with (selling/transporting) a destructive device.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold/transported) a destructive device;**
2. **The defendant knew (he/she) (sold/transported) it;**

AND

3. **The defendant knew that what (he/she) (sold/transported) was a destructive device.**

[As used here, *selling* means exchanging something for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another even if the distance is short.]

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[_____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[The term *destructive device* is defined in another instruction.]

[Two or more people may (sell/transport) something at the same time.]

[A person does not have to actually hold or touch something to (sell/transport) it. It is enough if the person has (control over it/[or] the right to control it), either personally or through another person.]

<Defense: Statutory Exception>

[The defendant did not unlawfully (sell/transport) a destructive device if (he/she) was legally authorized to do so. The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to (sell/transport) a

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destructive device. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the device used, give the bracketed definitions of "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

Defenses—Instructional Duty

Penal Code section 12303.6 allows for the sale, offer to sell, or transportation of a destructive device "as provided by this chapter." As with a permit for possession, the existence of a legally valid basis for the defendant to sell or transport a destructive device is an affirmative defense. (See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629 [154

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Cal.Rptr. 314].) If there is sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].)

AUTHORITY

- Elements. Pen. Code, § 12303.6.
- Destructive Device Defined. Pen. Code, § 12301.
- Knowledge. See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314]; *People v. Guy* (1980) 107 Cal.App.3d 593 [165 Cal.Rptr. 463].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

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2575. Offer to Sell Destructive Device

The defendant is charged [in Count ____] with offering to sell a destructive device.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant offered to sell a destructive device;

AND

2. The defendant intended to sell a destructive device.

[As used here, *selling* means exchanging something for money, services, or anything of value.]

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>***.]**

[_____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[The term *destructive device* is defined in another instruction.]

<Defense: Statutory Exception>

[The defendant did not unlawfully offer to sell a destructive device if (he/she) was legally authorized to do so. The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to offer to sell a destructive device. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the device used, give the bracketed definitions of "destructive device," inserting the appropriate description from Penal Code section 12301, unless the court has already given the definition in other

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instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

Defenses—Instructional Duty

Penal Code section 12303.6 allows for the sale, offer to sell, or transportation of a destructive device "as provided by this chapter." As with a permit for possession, the existence of a legally valid basis for the defendant to offer to sell a destructive device is an affirmative defense. (See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629 [154 Cal.Rptr. 314].) If there is sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].)

AUTHORITY

- Elements. Pen. Code, § 12303.6.
- Destructive Device Defined. Pen. Code, § 12301.
- Specific Intent Required for Offer to Sell. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

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- Knowledge. See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314]; *People v. Guy* (1980) 107 Cal.App.3d 593, 601 [165 Cal.Rptr. 463].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

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2576. Explosion of Explosive or Destructive Device With Intent to Murder

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The defendant is charged [in Count ____] with (exploding/ [or] igniting/ [or] attempting to (explode/ [or] ignite)) (an explosive/ [or] a destructive device) with intent to commit murder.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (exploded/ [or] ignited/ [or] attempted to (explode/ [or] ignite)) (an explosive/ [or] a destructive device);**

AND

2. **When the defendant did so, (he/she) acted with the intent to murder someone.**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> **is an *explosive*.]**

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>**.]**

[_____ <*insert type of destructive device from Pen. Code, § 12301*> **is a *destructive device*.]**

[The term[s] (*explosive/* [and] *destructive device*) (is/are) defined in another instruction.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges that the defendant attempted to explode or ignite the item, the court **must** also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

Related Instructions

If the jury is not otherwise instructed on murder or attempted murder, give a modified version of CALCRIM No. 520, *Murder With Malice Aforethought*.

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AUTHORITY

- Elements. Pen. Code, § 12308.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

RELATED ISSUES

Multiple Charges Based on Multiple Victims Appropriate

The defendant may be charged with multiple counts of violating Penal Code section 12308 based on multiple victims, even if he or she used only one explosive device. (*People v. Ramirez* (1992) 6 Cal.App.4th 1762, 1766–1767 [8 Cal.Rptr.2d 624].)

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier*.

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2577. Explosion of Explosive or Destructive Device Causing Bodily Injury

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The defendant is charged [in Count ____] with (exploding/ [or] igniting) (an explosive/ [or] a destructive device) causing bodily injury to another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously (exploded/ [or] ignited) (an explosive/ [or] a destructive device);**

AND

2. **The explosion caused bodily injury to another person.**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> **is an *explosive*.]**

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>**.]**

[_____ <*insert type of destructive device from Pen. Code, § 12301*> **is a *destructive device*.]**

[The term[s] (*explosive/* [and] *destructive device*) (is/are) defined in another instruction.]

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[An act causes bodily injury if the injury is the direct, natural, and probable consequence of the act, and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of bodily injury. An act causes bodily injury only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401] [causation issue in homicide].) If the evidence indicates that there was only one cause of injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of injury, the court should also give the "substantial factor" instruction and definition in the second bracketed paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device.

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For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

AUTHORITY

- Elements. Pen. Code, § 12309.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.
- Maliciously Defined. Pen. Code, § 7(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101]; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335 [130 Cal.Rptr. 349].
- Must Injure Another Person. *People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538 [37 Cal.Rptr.2d 489].
- General Intent Crime. See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970–1971 [10 Cal.Rptr.2d 15].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 144, *Crimes Against Order,* § 144.01[1][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

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- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

RELATED ISSUES

Maliciously—People v. Heideman

In *People v. Heideman* (1976) 58 Cal.App.3d 321 [130 Cal.Rptr. 349], the defendant offered to commit murder for hire using explosives and possessed the explosives. (*Id.* at pp. 327–329.) The defendant asserted that he did not actually intend to physically injure anyone but simply to defraud the individuals offering to pay for the murders. (*Id.* at pp. 330–331.) On appeal, the defendant contended that the court had improperly instructed on the meaning of "recklessness," which the prosecution conceded. (*Id.* at p. 334.) Noting that the "[d]efendant admitted that his purpose in storing the dynamite in his room was to carry out a nefarious scheme to defraud his victims," the court found sufficient evidence to establish malice. (*Id.* at p. 335.) The court stated that under the facts of the case before it, the term "maliciously" did not "require an actual intent to physically injure, intimidate or terrify others." *(Ibid.)* Accordingly, the court found that the error in the instruction on "recklessness" was harmless given that there was sufficient evidence to support the higher culpability standard of malice. *(Ibid.)* The committee did not incorporate the language from *Heideman* in the definition of "maliciously" in this instruction because the committee concluded that this case reflects unique facts and that the language quoted is dicta, not essential to the ruling of the case.

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier.*

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2578. Explosion of Explosive or Destructive Device Causing Death, Mayhem, or Great Bodily Injury

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The defendant is charged [in Count ____] with (exploding/ [or] igniting) (an explosive/ [or] a destructive device) causing (death[,]/ mayhem[,]/ [or] great bodily injury) to another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously (exploded/ [or] ignited) (an explosive/ [or] a destructive device);**

AND

2. **The explosion caused (death[,]/ mayhem[,]/ [or] great bodily injury) to another person.**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[*Mayhem* means unlawfully:

<A. Removing Body Part>

[Removing a part of someone's body](;[or]/.)

<B. Disabling Body Part>

[Disabling or making useless a part of someone's body and the disability is more than slight or temporary](;[or]/.)

<C. Disfigurement>

[Permanently disfiguring someone](;[or]/.)

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<D. Tongue Injury>

[Cutting or disabling someone's tongue](;[or]/.)

<E. Slitting Nose, Ear, or Lip>

[Slitting someone's (nose[,]/ear[,]/ [or] lip)](; or/.)

<F. Significant Eye Injury>

[Putting out someone's eye or injuring someone's eye in a way that so significantly reduces his or her ability to see that the eye is useless for the purpose of ordinary sight.]]

[A disfiguring injury may be *permanent* even though it can be repaired by medical procedures.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[_____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[The term[s] (*explosive*/ [and] *destructive device*) (is/are) defined in another instruction.]

[An act causes (death[,]/ mayhem[,]/ [or] great bodily injury) if the (death/injury) is the direct, natural, and probable consequence of the act, and the (death[,]/ mayhem[,]/ [or] great bodily injury) would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and

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probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of (death[,]/ mayhem[,]/ [or] great bodily injury). An act causes (death/injury) only if it is a substantial factor in causing the (death/injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/injury).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401] [causation issue in homicide].) If the evidence indicates that there was only one cause of injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of injury, the court should also give the "substantial factor" instruction and definition in the second bracketed paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

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If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

AUTHORITY

- Elements. Pen. Code, § 12310.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.
- Maliciously Defined. Pen. Code, § 7(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101]; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335 [130 Cal.Rptr. 349].
- Must Injure Another Person. See *People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538 [37 Cal.Rptr.2d 489].
- General Intent Crime. See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970–1971 [10 Cal.Rptr.2d 15].
- Great Bodily Injury Defined. *People v. Poulin* (1972) 27 Cal.App.3d 54, 61 [103 Cal.Rptr. 623].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][i], [ii], Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

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- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Explosion of a Destructive Device Causing Injury. Pen. Code, § 12309; see *People v. Poulin* (1972) 27 Cal.App.3d 54, 60 [103 Cal.Rptr. 623].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier,* and CALCRIM No. 2577, *Explosion of Explosive or Destructive Device Causing Bodily Injury*.

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2579. Possession of Materials to Make Destructive Device or Explosive

The defendant is charged [in Count ____] with unlawfully possessing a (substance[,]/[or] material[,]/ [or] combination of substances and materials) with the intent to make (an explosive/ [or] a destructive device).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a (substance[,]/ [or] material[,]/ [or] combination of substances and materials);**

AND

2. **When the defendant possessed (that/those) item[s], (he/she) intended to make (an explosive/ [or] a destructive device).**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> is an *explosive*.]

[A *destructive device* is _____ <*insert definition from Pen. Code, § 12301*>.]

[_____ <*insert type of destructive device from Pen. Code, § 12301*> is a *destructive device*.]

[The term[s] (*explosive*/ [and] *destructive device*) (is/are) defined in another instruction.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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<Defense: Permit>

[The defendant did not unlawfully possess a (substance[,]/ [or] material[,]/ [or] combination of substances and materials) if (he/ she) had a valid permit to make (an explosive/ [or] a destructive device). The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid permit to make (an explosive/ [or] a destructive device). If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge

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fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

Defenses—Instructional Duty

The existence of a valid permit is an affirmative defense to a violation of Penal Code section 12312. (*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629 [154 Cal.Rptr. 314].) The defendant bears the burden of producing evidence of a valid permit. If there is sufficient evidence to raise a reasonable doubt about the existence of a permit, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].)

AUTHORITY

- Elements. Pen. Code, § 12312.
- Explosive Defined. Health & Saf. Code, § 12000.
- Destructive Device Defined. Pen. Code, § 12301.
- Permit Exemption. Pen. Code, § 12305; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–628 [154 Cal.Rptr. 314].
- Substance or Material. *People v. Yoshimura* (1976) 62 Cal.App.3d 410, 415 [154 Cal.Rptr. 314].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

RELATED ISSUES

"Substance" or "Material" Not Unconstitutionally Vague

Section 12312 provides that possession of a "substance" or "material" is punishable only if the possession is with the specific intent to make

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> a destructive device or explosive. . . . When the statute is thus read as a whole, the vagueness of the meaning of "substance" and "material" is eliminated, and the terms are seen to refer to constituent or necessary items in the construction of nonlicensed destructive devices and explosives.

(*People v. Yoshimura* (1976) 62 Cal.App.3d 410, 415 [133 Cal.Rptr. 228].)

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F. OTHER WEAPONS OFFENSES

2590. Armed Criminal Action

The defendant is charged [in Count ____] with carrying a loaded firearm with intent to commit a felony.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried a firearm;**
2. **The defendant knew that (he/she) was carrying the firearm;**
3. **When the defendant carried the firearm, (he/she) intended to commit _____ <*insert felony alleged*>;**

[AND]

4. **The firearm was loaded(;/.)**

<See Commentary regarding element 5.>

[AND

5. **The defendant knew that the firearm was loaded.]**

[A ***firearm*** **is any device designed to be used as a weapon, from which a projectile is expelled or expelled through a barrel by the force of an explosion or other form of combustion.]**

[The term *firearm* is defined in another instruction.]

As used here, a firearm is *loaded* if the firearm and ammunition capable of being discharged from the firearm are in the immediate possession of the same person.

<See Commentary regarding this paragraph.>

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

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<*See Commentary regarding this paragraph.*>

[A person *carries* a firearm when he or she has the firearm on his or her person or has it available for use in either offense or defense.]

To decide whether the defendant intended to commit _____ <*insert felony alleged*>, please refer to the separate instructions that I (will give/have given) you on that crime.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

AUTHORITY

- Elements. Pen. Code, § 12023.
- Firearm Defined. Pen. Code, § 12001(b).
- Loaded Defined. Pen. Code, § 12001(j).
- Knowledge of Presence of Weapon Required. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 194.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

COMMENTARY

There are no published cases on this statute. Thus, it is unclear whether the firearm must be operable or whether the defendant must know the firearm

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is "loaded." It is also unclear whether the statute requires that the defendant carry the firearm on his or her person or whether it is sufficient if the defendant "has the firearm available." (See *People v. Wandick* (1991) 227 Cal.App.3d 918, 928 [278 Cal.Rptr. 274] [discussing definition of "armed" in Pen. Code, § 12022(a)].) The instruction has been drafted to provide the court options on these issues. If these issues are present in the case, the court must decide whether to give bracketed element 5 and which of the bracketed paragraphs are appropriate.

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2591. Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Conviction or Mental Illness

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The defendant is charged [in Count ____] with unlawfully possessing ammunition.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/possessed/had under (his/her) custody or control) ammunition;**
2. **The defendant knew (he/she) (owned/possessed/had under (his/her) custody or control) the ammunition;**

[AND]

<Alternative 3A—prohibited due to mental illness or SVP status>

[3. The defendant _____ <*insert description from Welf. & Inst. Code, § 8100 or 8103***>.]**

<Alternative 3B—prohibited due to conviction. Give both element 3B and element 4 in cases involving misdemeanor convictions or juvenile findings. For all other cases involving prior convictions, give 3B only.>

[3. The defendant had previously been convicted of (a felony/a misdemeanor/two offenses of brandishing a firearm/the crime of _____ <*insert misdemeanor offense from Pen. Code, § 12021(c) or 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)***>)(;/.)]**

[AND

4. **(The previous conviction was within 10 years of the date the defendant possessed the ammunition./The defendant was less than 30 years old at the time (he/she) possessed the ammunition.)]**

Ammunition **means a bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence.** ***Ammunition*** **includes reloaded ammunition.**

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[A juvenile court finding is the same as a conviction.]

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of a (a felony/a misdemeanor/two offenses of brandishing a firearm/the crime of _____ *<insert misemeanor offense from Pen. Code, § 12021(c) or 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***). This stipulation means that you must accept this fact as proved.]**

<Alternative A—limiting instruction when stipulation as to conviction>

[Do not consider this fact for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about or discuss the nature of the conviction.]**

<Alternative B—limiting instruction when no stipulation as to conviction>

[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the charged crime [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing defendant's credibility>***]. Do not consider such evidence for any other purpose.]**

<Defense: Justifiable Possession>

[If you conclude that the defendant possessed ammunition, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the ammunition. In order to establish this defense, the defendant must prove that:

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1. (He/She) (found the ammunition/took the ammunition from a person who was committing a crime against the defendant);

AND

2. (He/She) possessed the ammunition no longer than was necessary to deliver or transport the ammunition to a law enforcement agency for that agency to dispose of the ammunition.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give element 4 only if the prosecution alleges that the defendant was prohibited from possessing firearms under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

If the defendant has not stipulated to the conviction, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated," and insert the full name of the offense in element 3B.

If the defendant does stipulate to the conviction, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated," and in element 3B select the word "felony" or "misdemeanor." The court must sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant agrees, the court must not read the portion of the information

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describing the nature of the conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the conviction. (*People v. Valentine, supra,* 42 Cal.3d at p. 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].) If the defendant does not stipulate to the conviction, give alternative A. If the defendant does stipulate, give alternative B.

Defenses—Instructional Duty

Penal Code section 12316(d) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing the defense by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph on the defense of justifiable possession. This defense only applies to persons "prohibited from possessing any ammunition or reloaded ammunition solely because that person is prohibited from owning or possessing a firearm only by virtue of Section 12021." (Pen. Code, § 12316(d)(1)(C).)

AUTHORITY

- Elements. Pen. Code, § 12316(b)(1).
- Ammunition Defined. Pen. Code, § 12316(b)(2).
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Justifiable Possession. Pen. Code, § 12316(d).
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 160.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][e] (Matthew Bender).

(New January 2006)

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2592. Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Court Order

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The defendant is charged [in Count ____] with unlawfully possessing ammunition.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/possessed/had under (his/her) custody or control) ammunition;**
2. **The defendant knew (he/she) (owned/possessed/had under (his/her) custody or control) the ammunition;**

[AND]

3. **A court had ordered that the defendant not (own/ purchase/receive/possess) a firearm(;/.)**

<Give element 4 in cases involving restraining orders.>

[AND

4 The defendant knew of the court's order.]

Ammunition **means a bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence.** ***Ammunition*** **includes reloaded ammunition.**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The defendant and the People have stipulated, or agreed, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm. This stipulation means that you must accept this fact as proved.]

<Alternative A—limiting instruction when stipulation as to order>

[Do not consider this fact for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g.,*

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determining the defendant's credibility>**]. Do not speculate about why the court's order was made.]**

<*Alternative B—limiting instruction when no stipulation as to order*>

[You may consider evidence, if any, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm only in deciding whether the People have proved this element of the charged crime [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing defendant's credibility*>]. Do not consider such evidence for any other purpose.]

<*Defense: Justifiable Possession*>

[If you conclude that the defendant possessed ammunition, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the ammunition. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the ammunition/took the ammunition from a person who was committing a crime against the defendant);**

AND

2. **(He/She) possessed the ammunition no longer than was necessary to deliver or transport the ammunition to a law enforcement agency for that agency to dispose of the ammunition.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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Use this instruction only if the prosecution alleges that the defendant was prohibited from possessing firearms under Penal Code section 12021(d)(1), possession by someone prohibited as a condition of probation who was convicted of a crime not listed in other provisions of Penal Code section 12021, or under Penal Code section 12021(g), possession by someone prohibited by a temporary restraining order or other protective order.

Give element 4 only if the prosecution alleges that the defendant was prohibited from possessing firearms under Penal Code section 12021(g).

If the defendant has not stipulated to the probation order, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated."

If the defendant does stipulate to the probation order, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated." The court must also sanitize all references to the probation order to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant agrees, the court must not read the portion of the information describing the nature of the conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the probation condition. (*People v. Valentine, supra,* 42 Cal.3d at p. 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].) If the defendant does not stipulate to the probation condition, give alternative A. If the defendant does stipulate, give alternative B.

Defenses—Instructional Duty

Penal Code section 12316(d) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense and the defense bears the burden of establishing the defense by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph on the defense of justifiable possession.

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AUTHORITY

- Elements. Pen. Code, § 12316(b)(1).
- Ammunition Defined. Pen. Code, § 12316(b)(2).
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Justifiable Possession. Pen. Code, § 12316(d).
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Constructive vs. Actual Possession. See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 160.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

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CRIMES AGAINST GOVERNMENT

A. BRIBERY OF OFFICIAL

2600. Giving or Offering a Bribe to an Executive Officer

2601. Giving or Offering a Bribe to a Ministerial Officer

2602. Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered

2603. Requesting or Taking a Bribe

2604–2609. Reserved for Future Use

B. BRIBERY OR INTIMIDATION OF WITNESS

(i) Bribery

2610. Giving or Offering a Bribe to a Witness

2611. Giving or Offering a Bribe to a Witness Not to Testify

2612. Witness Receiving a Bribe

2613–2619. Reserved for Future Use

(ii) Threatening or Intimidating

2620. Using Force or Threatening a Witness Before Testimony or Information Given

2621. Influencing a Witness by Fraud

2622. Intimidating a Witness

2623. Intimidating a Witness: Sentencing Factors

2624. Threatening a Witness After Testimony or Information Given

2625–2629. Reserved for Future Use

C. EVIDENCE TAMPERING

2630. Evidence Tampering by Peace Officer or Other Person

2631–2639. Reserved for Future Use

D. PERJURY

2640. Perjury

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2641. Perjury by False Affidavit
2642–2649. Reserved for Future Use

E. THREATENING OR RESISTING OFFICER

2650. Threatening a Public Official
2651. Trying to Prevent an Executive Officer From Performing Duty
2652. Resisting an Executive Officer in Performance of Duty
2653. Taking Firearm or Weapon While Resisting Peace Officer or Public Officer
2654. Intentionally Taking or Attempting to Take Firearm From Peace Officer or Public Officer
2655. Causing Death or Serious Bodily Injury While Resisting Peace Officer
2656. Resisting Peace Officer, Public Officer, or EMT
2657–2669. Reserved for Future Use

F. LAWFUL PERFORMANCE

2670. Lawful Performance: Peace Officer
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2672. Lawful Performance: Resisting Unlawful Arrest With Force
2673. Pat-Down Search
2674–2679. Reserved for Future Use

G. UNLAWFUL ASSEMBLY AND DISTURBING THE PEACE

2680. Courthouse Picketing
2681. Disturbance of Public Meeting
2682. Inciting a Riot
2683. Participating in a Riot
2684. Participating in a Rout
2685. Participating in an Unlawful Assembly
2686. Refusal to Disperse: Riot, Rout, or Unlawful Assembly
2687. Refusal to Disperse: Intent to Commit Unlawful Act
2688. Disturbing the Peace: Fighting or Challenging Someone to Fight

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2689. Disturbing the Peace: Loud and Unreasonable Noise
2690. Disturbing the Peace: Offensive Words
2691–2699. Reserved for Future Use

H. VIOLATION OF COURT ORDER

2700. Violation of Court Order
2701. Violation of Court Order: Protective Order or Stay Away
2702. Violation of Court Order: Protective Order or Stay Away—Physical Injury
2703. Violation of Court Order: Protective Order or Stay Away—Act of Violence
2704–2719. Reserved for Future Use

I. CRIMES INVOLVING PRISONERS

(i) Assault and Battery

2720. Assault by Prisoner Serving Life Sentence
2721. Assault by Prisoner
2722. Battery by Gassing
2723. Battery by Prisoner on Nonprisoner
2724–2734. Reserved for Future Use

(ii) Hostage Taking and Rioting

2735. Holding a Hostage
2736. Inciting a Riot in a Prison or Jail
2737–2744. Reserved for Future Use

(iii) Possession of Contraband

2745. Possession or Manufacture of Weapon in Penal Institution
2746. Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp
2747. Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution
2748. Possession of Controlled Substance or Paraphernalia in Penal Institution

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2749–2759. Reserved for Future Use

(iv) Escape

2760. Escape
2761. Escape by Force or Violence
2762. Escape After Remand or Arrest
2763. Escape After Remand or Arrest: Force or Violence
2764. Escape: Necessity Defense
2765–2799. Reserved for Future Use

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A. BRIBERY OF OFFICIAL

2600. Giving or Offering a Bribe to an Executive Officer

The defendant is charged [in Count ____] with (giving/ [or] offering) a bribe to an executive officer.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (gave/ [or] offered) a bribe to an executive officer in this state [or someone acting on the officer's behalf];**

AND

2. **The defendant acted with the corrupt intent to unlawfully influence that officer's official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] _____ <*insert description of alleged conduct in other proceeding*>).**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, [or] opinion, [or _____ <*insert description of alleged conduct at other proceeding*>] of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] proceeding) the defendant sought to influence must have related to an existing subject that could have been brought before the public officer in his or her official capacity. It does not have to relate to a duty specifically given by statute to that officer.

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., police officer, commissioner, etc.*> is an executive officer.]

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[The executive officer does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe. [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute applies to giving or offering a bribe to "any executive officer . . . with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer . . . ." It is unclear what "other proceeding" refers to and there are no cases defining the phrase. If the evidence presents an issue about attempting to influence an officer in any "other proceeding," the court may insert a description of the proceeding where indicated.

Give the bracketed sentence that begins with "The executive officer does not" if the evidence shows that the executive officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

- Elements. Pen. Code, § 67.
- Bribe Defined. Pen. Code, § 7(6).
- Corruptly Defined. Pen. Code, § 7(3).
- Executive Officer Defined. *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].

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- Subject Matter of Bribe. *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782 [106 P.2d 84], disapproved on other grounds in *People v. Posey* (2004) 32 Cal.4th 193, 214–215 [8 Cal.Rptr.3d 551, 82 P.3d 755] and *People v. Simon* (2001) 25 Cal.4th 1082, 1108 [108 Cal.Rptr.2d 385, 25 P.3d 598]; *People v. Diedrich* (1982) 31 Cal.3d 263, 276 [182 Cal.Rptr. 354, 643 P.2d 971].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].
- No Bilateral Agreement Necessary. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351 [144 Cal.Rptr. 451].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

RELATED ISSUES

Entrapment

The crime is complete once an offer is made. Accordingly, subsequent efforts to procure corroborative evidence do not constitute entrapment. (*People v. Finkelstin* (1950) 98 Cal.App.2d 545, 553 [220 P.2d 934]; *People v. Bunkers* (1905) 2 Cal.App. 197, 209 [84 P. 364].)

Accomplice Liability and Conspiracy

The giver and the recipient of a bribe are not accomplices of one another, nor are they coconspirators, because they are guilty of distinct crimes that require different mental states. (*People v. Wolden* (1967) 255 Cal.App.2d 798, 804 [63 Cal.Rptr. 467].)

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, the defendant cannot be guilty of receiving a bribe and extortion in the

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same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].)

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2601. Giving or Offering a Bribe to a Ministerial Officer

The defendant is charged [in Count ____] with (giving/ [or] offering) a bribe to a (ministerial officer/government employee/ government appointee).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (gave/ [or] offered) a bribe to (a/an) (ministerial officer/employee/appointee) of the (State of California/City of _____ <*insert name of city*>/County of _____ <*insert name of county*>/_____ <*insert name of political subdivision from Pen. Code, § 67.5*>) [or to someone acting on the (officer's/employee's/appointee's) behalf];**

AND

2. **The defendant acted with the corrupt intent to unlawfully influence that (officer's/employee's/appointee's) official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] _____ <*insert description of alleged conduct in other proceeding*>).**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, or opinion of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] proceeding) the defendant sought to influence must have related to an existing subject that could have been brought before the (officer/ employee/appointee) in his or her official capacity. It does not have to relate to a duty specifically given by statute to that (officer/employee/appointee).

[A *ministerial officer* is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]

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[The (officer/employee/appointee) does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe. [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), give CALCRIM No. 2602, *Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered.*

Give the bracketed sentence that begins with "The (officer/employee/appointee) does not" if the evidence shows that the officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

- Elements. Pen. Code, § 67.5.
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- Grand Theft Defined. Pen. Code, § 487.
- Ministerial Officer Defined. Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].
- Subject Matter of Bribe. *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782 [106 P.2d 84], disapproved on other grounds in *People v.*

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Posey (2004) 32 Cal.4th 193, 214–215 [8 Cal.Rptr.3d 551, 82 P.3d 755] and *People v. Simon* (2001) 25 Cal.4th 1082, 1108 [108 Cal.Rptr.2d 385, 25 P.3d 598]; *People v. Diedrich* (1982) 31 Cal.3d 263, 276 [182 Cal.Rptr. 354, 643 P.2d 971].

- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].
- No Bilateral Agreement Necessary. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351 [144 Cal.Rptr. 451].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), then the misdemeanor is a lesser included offense (Pen. Code, § 67.5(a)). The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that the thing offered was worth more than $400 or was something that if stolen would qualify as grand theft. If the jury finds that this allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2600, *Giving or Offering a Bribe to an Executive Officer.*

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2602. Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered

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If you find the defendant guilty of (giving/ [or] offering) a bribe to a (ministerial officer/government employee/government appointee), you must then decide whether the People have proved the additional allegation that the defendant (offered/ [or] gave) the (officer/employee/appointee) (something worth more than $400/_____ <*insert other item from Pen. Code, § 487*>).

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2601, *Giving or Offering a Bribe to a Ministerial Officer.*

The court must provide the jury with a verdict form on which the jury will indicate if the alleged sentencing factor has or has not been proved.

AUTHORITY

- Elements. Pen. Code, § 67.5(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

(New January 2006)

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2603. Requesting or Taking a Bribe

The defendant is charged [in Count ____] with (requesting[,]/ taking[,]/ [or] agreeing to take) a bribe.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was (a/an) (executive officer/ministerial officer/employee/appointee/legislative officer/judicial officer) of the (State of California/City of _____ <*insert name of city*>/County of _____ <*insert name of county*>/_____ <*insert name of political subdivision from Pen. Code, § 68*>);**
2. **The defendant (requested[,]/ took[,]/ [or] agreed to take) a bribe;**
3. **When the defendant (requested[,]/ took[,]/ [or] agreed to take) the bribe, (he/she) represented that the bribe would unlawfully influence (his/her) official (act[,]/ decision[,]/ vote[,]/ [or] opinion). The representation may have been express or implied;**

AND

4. **The defendant acted with the corrupt intent that (his/her) public or official duty would be unlawfully influenced.**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or taken with the corrupt intent that the public or official action, vote, decision, or opinion of the person to who is requesting, taking, or agreeing to take the bribe, will be unlawfully influenced.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [A _____ <*insert title, e.g., police officer, commissioner, etc.*> is an executive officer.]]

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[A *ministerial officer* is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]

[A *legislative officer* is a member of the (Assembly/Senate) of this state.]

[A *judicial officer* includes a (juror[,]/ [or] judge [,]/ [or] referee[,]/ [or] commissioner[,]/ [or] arbitrator [,]/ [or] umpire[,]/ [or] [other] person authorized by law to hear or determine any question or controversy).]

[*Requesting or agreeing to take a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else. [The People do not need to prove that the other person actually consented to give a bribe.]]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed definition of "requesting or agreeing to take a bribe" if the prosecution is pursuing this theory.

Give the bracketed sentence that begins with "The People do not need to prove that the defendant made any effort to follow through" if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

- Elements. Pen. Code, §§ 68, 86, 93.
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- Executive Officer Defined. *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].

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- Ministerial Officer Defined. Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Legislative Member. Pen. Code, § 86.
- Judicial Officer. Pen. Code, § 93.
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2600, *Giving or Offering a Bribe to an Executive Officer.*

(New January 2006)

2604–2609. Reserved for Future Use

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B. BRIBERY OR INTIMIDATION OF WITNESS

(i) Bribery

2610. Giving or Offering a Bribe to a Witness

The defendant is charged [in Count ____] with (giving[,]/ [or] offering[,]/ [or] promising) a bribe to a witness.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (gave[,]/ [or] offered[,]/ [or] promised) a bribe to (a witness[,]/ [or] a person about to be called as a witness[,]/ [or] a person about to give material information to a law enforcement official about a crime)[,] [or to someone acting on the (witness's/ [or] person's) behalf];**

AND

2. **The defendant acted with the corrupt intent to persuade the (witness/ [or] person) to agree that the bribe would unlawfully influence the (testimony/information) that the (witness/ [or] person) would give.**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the testimony or information of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

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- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

[OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

[OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is *about to be called as a witness* (if he or she knows or has been told that he or she will be called as a witness [,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed).]

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or]deputy attorney general[,]/ [or] _____ <*insert title of peace officer included in Pen. Code, § 830 et seq.*>**) is a *law enforcement official*.]**

[The (witness/ [or] person giving information) does not need to (have accepted the bribe[,]/ have been influenced by the bribe[,]/ [or] have intended to give the (testimony/information) the defendant sought).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe. [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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Give the bracketed sentence that begins with "The (witness/person giving information) does not need" if the evidence shows the witness did not accept the bribe or follow through on the bribe.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

- Elements. Pen. Code, § 137(a).
- Witness Defined. Pen. Code, § 136(2).
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- Law Enforcement Official Defined. Pen. Code, § 137(e).
- About to Be Called as a Witness. *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76 [142 Cal.Rptr. 628].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Intent Requirement. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

RELATED ISSUES

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, one cannot be guilty of receiving a bribe and extortion in the same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].)

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Witness

A witness need not have information that is actually true or that relates to charges that result in conviction. (*People v. Cribas* (1991) 231 Cal.App.3d 596, 610–611 [282 Cal.Rptr. 538].)

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2611. Giving or Offering a Bribe to a Witness Not to Testify

The defendant is charged [in Count ____] with (giving[,]/ [or] offering[,]/ [or] promising) a bribe to a witness not to testify.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (gave[,]/ [or] offered[,]/ [or] promised) a bribe to (a witness/ [or] a person about to be called as a witness) [or to someone else acting on the (witness's/ [or] person's) behalf];**

AND

2. **The defendant acted with the corrupt intent that the bribe would unlawfully persuade the (witness/ [or] person) not to attend (a trial/ [or] _____ <*insert type of other judicial proceeding*>).**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the witness not to attend (a trial/ [or] _____ <*insert type of other judicial proceeding*>).

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<*Give the appropriate bracketed paragraph[s].*>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

[OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

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[OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is *about to be called as a witness* (if he or she knows or has been told that he or she will be called as a witness[,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed). [Information is *material* if it is significant or important.]]

[The (witness/ [or] person giving information) does not need to (have accepted the bribe[,]/ have been influenced by the bribe[,]/ [or] have failed to attend (the trial[,]/ [or] _____ <*insert type of other judicial proceeding*>)).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to ensure that the witness will not attend (a trial/ [or] _____ <*insert type of other judicial proceeding*>). [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with "The (witness/person giving information) does not need" if the evidence shows the witness did not accept the bribe or follow through on the bribe.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

- Elements. Pen. Code, § 138(a).
- Witness Defined. Pen. Code, § 136(2).
- Bribe Defined. Pen. Code, § 7, subd. 6.

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- Corruptly Defined. Pen. Code, § 7, subd. 3.
- About to Be Called as a Witness. *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76 [142 Cal.Rptr. 628].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Intent Requirement. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2610, *Giving or Offering a Bribe to a Witness*.

(New January 2006)

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2612. Witness Receiving a Bribe

The defendant is charged [in Count ____] with receiving a bribe as a witness.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was (a witness/about to be called as a witness);**
2. **The defendant (received/ [or] offered to receive) a bribe;**
3. **When the defendant (received/ [or] offered to receive) the bribe, (he/she) represented that the bribe would unlawfully (influence (his/her) testimony/cause (him/her) not to attend the (trial/_____ <*insert type of other judicial proceeding*>)). The representation may have been express or implied;**

AND

4. **The defendant acted with the corrupt intent that the bribe would unlawfully (influence (his/her) testimony/cause (him/her) not to attend the (trial/_____ <*insert type of other judicial proceeding*>)).**

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or received with corrupt intent.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[As used here, *witness* means someone [or a person reasonably believed to be someone]:

<*Give the appropriate bracketed paragraph[s].*>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

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[OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

[OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is *about to be called as a witness* (if he or she knows or has been told that he or she will be called as a witness[,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed). [Information is *material* if it is significant or important.]]

[*Offering to receive a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else. [The People do not need to prove that the other person actually consented to give a bribe.]]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the definition of "offering to take a bribe" if that is the prosecution's theory of the case.

Give the bracketed sentence that begins with "The People do not need to prove" if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

- Elements. Pen. Code, § 138(b).

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- Witness Defined. Pen. Code, § 136(2).
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- About to Be Called as a Witness. *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76 [142 Cal.Rptr. 628].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2610, *Giving or Offering a Bribe to a Witness*.

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(ii) Threatening or Intimidating

2620. Using Force or Threatening a Witness Before Testimony or Information Given

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The defendant is charged [in Count ____] with (using force/ [or] threatening to use force) against a person to cause that person [or someone else] to (give false (testimony/ [or] information)/ [or] withhold true (testimony/ [or] information)).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (used force/ [or] threatened to use force) against _____** <*insert name/description of person allegedly targeted*>**;**

AND

<*Alternative 2A—to give or withhold testimony*>

[2. When the defendant (used force/ [or] made the threat), (he/she) intended to cause _____ <*insert name/description of person defendant allegedly sought to influence*> **to (give false testimony/ [or] withhold true testimony).]**

<*Alternative 2B—to give or withhold information*>

[2. When the defendant (used force/ [or] made the threat), (he/she) intended to cause _____ <*insert name/description of person defendant allegedly sought to influence*> **to (give false material information about a crime to/ [or] withhold true material information about a crime from) a law enforcement official.]**

[A person *makes a threat of force* when he or she communicates to someone else a believable threat of unlawful injury to a person or property.]

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney

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General[,]/ [or] deputy attorney general[,]/ [or] _____ <*insert title of peace officer included in Pen. Code, § 830 et seq.*>**) is a *law enforcement official*.]**

[The People do not need to prove that _____ <*insert name/ description of person defendant allegedly sought to influence*> **actually (gave false (testimony/information)/ [or] withheld true (testimony/information)).]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that beings with "A person *makes a threat of force*" whenever the prosecution alleges that the defendant made a threat. (Pen. Code, § 137(b).)

Give the bracketed sentence that begins with "The People do not need to prove that" if the evidence shows that the testimony or information of the alleged target was not affected.

AUTHORITY

- Elements. Pen. Code, § 137(b).
- Threat Defined. Pen. Code, § 137(b).
- Law Enforcement Official Defined. Pen. Code, § 137(e).
- Specific Intent Required. *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a

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lesser included offense of section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot "influence" the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which require that a defendant prevent, rather than influence, testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 931 [47 Cal.Rptr.2d 76].)

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2621. Influencing a Witness by Fraud

The defendant is charged [in Count ____] with using fraud to influence a person to (give false (testimony/ [or] information)/ [or] withhold true (testimony/ [or] information)).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used fraud against** _____ <*insert name/ description of person defendant allegedly sought to influence*>**;**

AND

<*Alternative 2A—to give or withhold testimony*>

[2. When the defendant used fraud, (he/she) intended to cause _____ <*insert name/description of person defendant allegedly sought to influence*> **to (give false testimony/ [or] withhold true testimony).]**

<*Alternative 2B—to give or withhold information*>

[2. When the defendant used fraud, (he/she) intended to cause _____ <*insert name/description of person defendant allegedly sought to influence*> **to (give false material information about a crime to/ [or] withhold true material information about a crime from) a law enforcement official.]**

A person *uses fraud* when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or] deputy attorney general[,]/ [or] _____ <*insert title of peace officer included in Pen. Code, § 830 et seq.*>**) is a *law enforcement official*.]**

[The People do not need to prove that _____ <*insert name/ description of person defendant allegedly sought to influence*>

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actually (gave false (testimony/information)/ [or] withheld true (testimony/information)).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with "The People do not need to prove that" if the evidence shows that the testimony or information of the alleged target was not affected.

AUTHORITY

- Elements. Pen. Code, § 137(b).
- Fraud Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770].
- Law Enforcement Official Defined. Pen. Code, § 137(e).
- Specific Intent Required. *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

LESSER INCLUDED OFFENSES

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Deceiving a Witness

Deceiving a witness is a separate crime under Penal Code section 133:

> Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or

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writing, to any witness or person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

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2622. Intimidating a Witness

The defendant is charged [in Count ____] with intimidating a witness.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—attending or giving testimony>

[1. The defendant maliciously (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ <*insert name/description of person defendant allegedly sought to influence*> from (attending/ [or] giving testimony at) _____ <*insert type of judicial proceeding or inquiry authorized by law*>;]

<Alternative 1B—report of victimization>

[1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ <*insert name/description of person defendant allegedly sought to influence*> from making a report that (he/she/someone else) was a victim of a crime to _____ <*insert type of official specified in Pen. Code, § 136.1(b)(1)*>;]

<Alternative 1C—causing prosecution>

[1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ <*insert name/description of person defendant allegedly sought to influence*> from cooperating or providing information so that a (complaint/indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]

<Alternative 1D—causing arrest>

[1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ <*insert name/description of person defendant allegedly sought to influence*> from (arresting[,]/ [or] (causing/ [or] seeking) the arrest of [,]) someone in connection with a crime;]

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2. _____ <*insert name/description of person defendant allegedly sought to influence*> **was a (witness/ [or] crime victim);**

AND

3. The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____ <*insert name/description of person defendant allegedly sought to influence*> **from** _____ <*insert appropriate description from element 1*> **and intended to do so.**

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<*Give the appropriate bracketed paragraph[s].*>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

[OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

[OR

- **[Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

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[It is not a defense that no one was actually physically injured or otherwise intimidated.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits "knowingly and maliciously" preventing or attempting to prevent a witness or victim from giving testimony. Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). Subdivision (b) does not use the words "knowingly and maliciously." However, subdivision (c) provides a higher punishment if a violation of either subdivision (a) or (b) is done "knowingly and maliciously," and one of the other listed sentencing factors is proved. An argument can be made that the knowledge and malice requirements apply to all violations of Penal Code section 136.1(b), not just those charged with the additional sentencing factors under subdivision (c). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].) If the court concludes that the malice requirement also applies to all violations of subdivision (b), the court should give the bracketed word "maliciously" in element 1, in alternatives 1B through 1D, and the definition of this word.

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give CALCRIM No. 2623, *Intimidating a Witness: Sentencing Factors*. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both CALCRIM No. 2623 and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, "For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that

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the act was without malice." It is unclear whether the court must instruct on this presumption.

AUTHORITY

- Elements. Pen. Code, § 136.1(a) & (b).
- Malice Defined. Pen. Code, § 136(1).
- Witness Defined. Pen. Code, § 136(2).
- Victim Defined. Pen. Code, § 136(3).
- Specific Intent Required. *People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.07, Ch. 84, *Motions at Trial,* § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4][b]; Ch. 144, *Crimes Against Order,* § 144.03[2], [4] (Matthew Bender).

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. In the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a

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lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot "influence" the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 931 [47 Cal.Rptr.2d 76].)

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2623. Intimidating a Witness: Sentencing Factors

If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation[s] that the defendant [acted maliciously] [and] [(acted in furtherance of a conspiracy/ [or] used or threatened to use force/ [or] acted to obtain money or something of value)].

To prove (this/these) allegation[s], the People must prove that:

[1. The defendant acted maliciously(;/.)]

[AND]

<Alternative A—furtherance of a conspiracy>

[(2A/1). The defendant acted with the intent to assist in a conspiracy to intimidate a witness(;/.)]

<Alternative B—used or threatened force>

[(2B/2). The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of [a] (witness[,]/ [or] victim[,]/ [or] any other person)(;/.)]

<Alternative C—financial gain>

[(2C/3). The defendant acted (in order to obtain (money/ [or] something of value)/ [or] at the request of someone else in exchange for something of value).]

[Instruction[s] ____ <*insert instruction number[s]***> explain[s] when someone is acting in a conspiracy to intimidate a witness. You must apply (that/those) instruction[s] when you decide whether the People have proved this additional allegation.** *<The court must modify and give Instruction 415 et seq., explaining the law of conspiracy as it applies to the facts of the particular case.>***]**

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

The People have the burden of proving (this/each) allegation beyond a reasonable doubt. If the People have not met this

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burden [for any allegation], you must find that (this/the) allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on Penal Code section 136.1(c), the court has a **sua sponte** duty to instruct on the alleged sentencing factor. This instruction **must** be given with CALCRIM No. 2622, *Intimidating a Witness*.

As noted in the Bench Notes to CALCRIM No. 2622, the court will instruct the jury that knowledge and malice are elements of a violation of Penal Code section 136.1(a) and may, in some circumstances, also instruct that malice is an element of a violation of Penal Code section 136.1(b). If the court has given the malice element in CALCRIM No. 2622, the court may delete it here. If the court has not already given this element and the defendant is charged under subdivision (c), the court must give the bracketed element requiring malice here.

If the defendant is charged with the sentencing factor based on a prior conviction, the court must give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction. In such cases, the court should also give this instruction, CALCRIM No. 2623, only if the court has not already instructed the jury on malice or the defendant is also charged with another sentencing factor.

The court must provide the jury with a verdict form on which the jury will indicate if each alleged sentencing factor has or has not been proved.

If the court instructs on furtherance of a conspiracy, give the appropriate corresponding instructions on conspiracy. (See CALCRIM No. 415, *Conspiracy*.)

AUTHORITY

- Elements. Pen. Code, § 136.1(c).
- Malice Defined. Pen. Code, § 136(1).

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.07, Ch. 84, *Motions at Trial,* § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4][b], Ch. 144, *Crimes Against Order,* § 144.03[2], [4] (Matthew Bender).

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2624. Threatening a Witness After Testimony or Information Given

The defendant is charged [in Count ____] with (using force/ [or] threatening to use force) against a witness.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*insert name/description of person allegedly targeted*> **gave (assistance/ [or] information) to a (law enforcement officer/public prosecutor) in a (criminal case/ juvenile court case);**

AND

2. **The defendant willfully (used force/ [or] threatened to use force or violence against** _____ <*insert name/description of person allegedly targeted*>**/ [or] threatened to take, damage, or destroy the property of** _____ <*insert name/description of person allegedly targeted*>**) because (he/ she) had given that (assistance/ [or] information).**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An officer or employee of (a/an) (local police department[,]/ [or] sheriff's office[,]/ [or] _____ <*insert title of agency of peace officer enumerated in Pen. Code, § 13519(b)*>**) is a *law enforcement officer*.]**

[A lawyer employed by (a/an/the) (district attorney's office[,]/ [or] Attorney General's office[,]/ [or] city (prosecutor's/attorney's) office) to prosecute cases is a *public prosecutor*.]

[The People do not need to prove that the threat was communicated to _____ <*insert name/description of person allegedly targeted*> **or that (he/she) was aware of the threat.]**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 140(a).
- Witness Defined. Pen. Code, § 136(2).
- Victim Defined. Pen. Code, § 136(3).
- Public Prosecutor Defined. Gov. Code, §§ 26500, 12550, 41803.
- Law Enforcement Officer Defined. Pen. Code, § 13519(b).
- General Intent Offense. *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306].
- Threat Need Not Be Communicated to Target. *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02; Ch. 142, *Crimes Against the Person,* § 142.11A[1][a] (Matthew Bender).

COMMENTARY

Penal Code section 140 does not define "threat." (Cf. Pen. Code, §§ 137(b), 76 [both statutes containing definition of threat].) In *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306], the Court of Appeal held that threatening a witness under Penal Code section 140 is a general intent crime. According to the holding of *People v. McDaniel, supra,* 22 Cal.App.4th at p. 284, there is no requirement that the defendant intend to cause fear to the victim or intend to affect the victim's conduct in any manner. In *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4], the court held that the threat does not need to be communicated to the intended target in any manner. The committee has drafted this instruction in accordance with these holdings. However, the court may wish to consider whether the facts in the case before it

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demonstrate a sufficiently "genuine threat" to withstand First Amendment scrutiny. (See *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

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C. EVIDENCE TAMPERING

2630. Evidence Tampering by Peace Officer or Other Person

The defendant is charged [in Count ____] with tampering with evidence.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and intentionally (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) _____ <*insert name/description of physical matter at issue*>;**
2. **The defendant knew (he/she) was (changing[,]/ [or] planting[,]/ [or] placing[,]/ [or] making[,]/ [or] hiding[,]/ [or] moving) the _____ <*insert name/ description of physical matter at issue*>;**

[AND]

3. **When the defendant (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) the _____ <*insert name/description of physical matter at issue*>, (he/she) intended that (his/her) action would result in (someone being charged with a crime/ [or] the _____ <*insert name/description of physical matter at issue*> being wrongfully produced as genuine or true in (a/an) _____ <*insert type of court proceeding specified in Pen. Code, § 141*>)(;/.)**

<Give element 4 if the defendant is charged under Pen. Code, § 141(b).>

[AND

4. **When the defendant acted, (he/she) was a peace officer.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

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[A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by** _____ *<insert appropriate section from Pen. Code, § 830 et seq.>* **to** _____ *<describe statutory authority>***, is a *peace officer*.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give element 4 if the defendant is a peace officer charged with a felony violation of Penal Code section 141(b).

The jury must determine whether the defendant was a peace officer. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury on the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for the court to instruct that a person is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

AUTHORITY

- Elements. Pen. Code, § 141.
- Peace Officer Defined. Pen. Code, § 830 et seq.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 4.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Inspection,* § 70.21[3] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence,* § 83.10[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on being a peace officer

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(Pen. Code, § 141(b)), then the misdemeanor of evidence tampering by a non-peace officer is a lesser included offense. (Pen. Code, § 141(a).)

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D. PERJURY

2640. Perjury

The defendant is charged [in Count ____] with perjury.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—defendant took an oath>

[1. The defendant took an oath to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) truthfully before a competent (tribunal[,]/ [or] officer[,]/ [or] person) under circumstances in which the oath of the State of California lawfully may be given;]

<Alternative 1B—defendant gave statement under penalty of perjury>

[1. The defendant (testified[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified) under penalty of perjury under circumstances in which such (testimony[,]/ [or] declaration[,]/ [or] deposition[,]/ [or] certificate) was permitted by law;]

2. When the defendant (testified[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified), (he/she) willfully stated that the information was true even though (he/she) knew it was false;

3. The information was material;

4. The defendant knew (he/she) was making the statement under (oath/penalty of perjury);

[AND]

5. When the defendant made the false statement, (he/she) intended to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely while under (oath/penalty of perjury)(;/.)

<Give element 6 only if statement made in declaration, deposition, or certificate.>

[AND

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6. The defendant signed and delivered (his/her) (declaration[,]/ [or] deposition[,]/ [or] certificate) to someone else intending that it be circulated or published as true.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An *oath* is an affirmation or any other method authorized by law to affirm the truth of a statement.]

[Information is *material* if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.]

[Information is *material* if _____ *<insert appropriate definition; see Bench Notes>*.**]**

The People do not need to prove that the defendant knew that the information in (his/her) statement was material.

You may not find the defendant's statement was false based on the testimony of _____ *<insert name of witness>* **alone. In addition to the testimony of** _____ *<insert name of witness>*, **there must be some other evidence that the defendant's statement was false. This other evidence may be direct or indirect. [However, if you conclude, based on the defendant's own testimony, that the allegedly false statement was in fact false, then additional evidence is not required.]**

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

The People allege that the defendant made the following false statement[s]: _____ *<insert alleged statement[s]>*.

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. The People do not need to prove that all the allegedly false statements were in fact false.]

[It is not a defense (that the oath was given or taken in an irregular manner/ [or] that the defendant did not go before or

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take the oath in the presence of the officer claiming to administer the oath) as long as the defendant caused the officer administering the oath to certify that the oath had been taken.]

[When a person makes a statement, without qualification, that information is true, but he or she does not know whether the information is true, the making of that statement is the same as saying something that the person knows is false.]

[If the defendant attempted to correct the statement after it was made, that attempt may show that the defendant did not intend to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely. It is up to you to decide the meaning and importance of that conduct.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to define "material." (People v. Kobrin (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027] [materiality is a fact question to be decided by the jury].) The first bracketed definition of material is appropriate for court proceedings or legislative hearings. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260] [not appropriate for charge of perjury on required disclosure forms].) For other types of proceedings, the court should use the second bracketed sentence, inserting an appropriate definition in the blank provided. (*Id.* at pp. 405–407.)

The court has a **sua sponte** duty to instruct the jury about the need for corroboration of the evidence of perjury. (*People v. Di Giacomo* (1961) 193 Cal.App.2d 688, 698 [14 Cal.Rptr. 574]; Pen. Code, § 118(b).) If the evidence that the statement is false is based in whole or in part on the defendant's testimony, give the bracketed sentence that begins with "However, if you conclude, based on the defendant's own testimony."

If the prosecution alleges under a single count that the defendant made multiple statements that were perjury, the court has a **sua sponte** duty to instruct on unanimity. (*People v. McRae* (1967) 256 Cal.App.2d 95, 120–

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121 [63 Cal.Rptr. 854].) Give the bracketed paragraph that begins with "You may not find the defendant guilty unless."

Give element 6 if the case involves a declaration, deposition, or certificate. (Pen. Code, § 124; *People v. Griffini* (1998) 65 Cal.App.4th 581, 596 [76 Cal.Rptr.2d 590] [delivery requirement applies to "declaration"; discussing at length meaning of "deposition," "declaration," "certificate," and "affidavit"]; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247 [108 Cal.Rptr.2d 123]; *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356].)

Give the bracketed sentence that begins with "It is not a defense (that the oath was given or taken in an irregular manner" on request if supported by the evidence and when instructing with element 1A. (Pen. Code, § 121.)

Give the bracketed sentence that begins with "When a person makes a statement, without qualification," on request if supported by the evidence. (Pen. Code, § 125.)

If there is sufficient evidence, give the bracketed paragraph that begins with "If the defendant attempted to correct." (*People v. Baranov* (1962) 201 Cal.App.2d 52, 60–61 [19 Cal.Rptr. 866].)

AUTHORITY

- Elements. Pen. Code, § 118.
- Oath Defined. Pen. Code, § 119.
- Irregular Oath Not a Defense. Pen. Code, § 121.
- Knowledge of Materiality Not Necessary. Pen. Code, § 123.
- Completion of Deposition, Affidavit, or Certificate. Pen. Code, § 124; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247 [108 Cal.Rptr.2d 123].
- Unqualified Statement Equivalent to False Statement. Pen. Code, § 125.
- Material Defined. *People v. Pierce* (1967) 66 Cal.2d 53, 61 [56 Cal.Rptr. 817, 423 P.2d 969]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260]; *People v. Rubio* (2004) 121 Cal.App.4th 927, 930–934 [17 Cal.Rptr.3d 524].
- Materiality Is Element to Be Decided by Jury. *People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027];

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People v. Feinberg (1997) 51 Cal.App.4th 1566, 1576 [60 Cal.Rptr.2d 323].

- Specific Intent to Testify Falsely Required. *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584 [181 Cal.Rptr. 848]; see also *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563] [discussing intent requirement for perjury].
- Good Faith Belief Statement True Negates Intent. *People v. Von Tiedeman* (1898) 120 Cal. 128, 134 [52 P. 155] [cited with approval in *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563]]; *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 43 [205 Cal.Rptr. 247].
- Declaration Must Be Delivered. *People v. Griffini* (1998) 65 Cal.App.4th 581, 596 [76 Cal.Rptr.2d 590].
- Unanimity. *People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 56–81.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings,* § 40.07[6] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Perjury. *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356].

RELATED ISSUES

Unsigned Deposition

In *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356], the court held that an unexecuted deposition transcript was like an undelivered statement that could not form the basis for a perjury conviction. Nevertheless, it was sufficient evidence to support a conviction on the lesser included offense of attempted perjury. *(Ibid.)*

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2641. Perjury by False Affidavit

The defendant is charged [in Count ____] with perjury by false affidavit.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant gave an affidavit in which (he/she) (swore[,]/ [or] affirmed[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified) that (he/she) would (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) before a competent (tribunal[,]/ [or] officer[,]/ [or] person) in connection with a case that had been or would be filed;**
2. **The defendant signed and delivered (his/her) affidavit to someone else intending that it be used, circulated, or published as true;**
3. **In the affidavit, the defendant willfully stated that information was true even though (he/she) knew it was false;**
4. **The information was material;**
5. **The defendant knew (he/she) was making the statement under (oath/affirmation);**

AND

6. **When the defendant made the false statement, (he/she) intended to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely while under (oath/affirmation).**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *affidavit* is a written statement made under an (oath/ affirmation) given by a person authorized to administer oaths. [An *oath* is an affirmation or any other method authorized by law to affirm the truth of a statement.]

[Information is *material* if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.]

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[Information is *material* if _____ <*insert appropriate definition; see Bench Notes*>.]

The People do not need to prove that the defendant knew that the information in (his/her) statement was material.

You may not find the defendant's statement was false based on the testimony of _____ <*insert name of witness*> alone. In addition to the testimony of _____ <*insert name of witness*>, there must be some other evidence that the defendant's statement was false. This other evidence may be direct or indirect. [However, if you conclude, based on the defendant's own testimony, that the allegedly false statement was in fact false, then additional evidence is not required.]

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

The People allege that the defendant made the following false statement[s]: _____ <*insert alleged statement[s]*>.

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. The People do not need to prove that all the allegedly false statements were in fact false.]

[It is not a defense (that the oath was given or taken in an irregular manner/ [or] that the defendant did not go before or take the oath in the presence of the officer claiming to administer the oath) as long as the defendant caused the officer administering the oath to certify that the oath had been taken.]

[If you find beyond a reasonable doubt that after the defendant made the statement[s] in the affidavit, (he/she) testified under oath in another case involving the same facts, but made [a] statement[s] that (was/were) different from (that/those) in the affidavit, you may, but are not required to, rely on that testimony to conclude that the statement[s] in the affidavit (is/ are) false.]

[When a person makes a statement, without qualification, that information is true, but he or she does not know whether the

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information is true, the making of that statement is the same as saying something that the person knows is false.]

[If the defendant attempted to correct the statement after it was made, that attempt may show that the defendant did not intend to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely. It is up to you to decide the meaning and importance of that conduct.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to define "material." (*People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027] [materiality is a fact question to be decided by the jury].) The first bracketed definition of material is appropriate for court proceedings or legislative hearings. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260] [not appropriate for charge of perjury on required disclosure forms].) For other types of proceedings, the court should use the second bracketed sentence, inserting an appropriate definition in the blank provided. *(Ibid.)*

The court has a **sua sponte** duty to instruct the jury about the need for corroboration of the evidence of perjury. (*People v. Di Giacomo* (1961) 193 Cal.App.2d 688, 698 [14 Cal.Rptr. 574]; Pen. Code, § 118(b).) If the evidence that the statement is false is based in whole or in part on the defendant's testimony, give the bracketed sentence that begins with "However, if you conclude, based on the defendant's own testimony."

If the prosecution alleges under a single count that the defendant made multiple statements that were perjury, the court has a **sua sponte** duty to instruct on unanimity. (*People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].) Give the bracketed paragraph that begins with "You may not find the defendant guilty unless."

Give the bracketed sentence that begins with "It is not a defense (that the oath was given or taken in an irregular manner" on request if supported by the evidence. (Pen. Code, § 121.)

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Do not give the bracketed paragraph stating that defendant "testified under oath in another case involving the same facts" if there is evidence that the defendant's statements alleged to be false in the current case were in fact true. (Pen. Code, § 118a; Evid. Code, §§ 600–607; *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) Although the statute creates a rebuttable presumption that the first statements made were false, the instruction has been written as a permissive inference. An instruction phrased as a rebuttable presumption would create an unconstitutional mandatory presumption. (See *People v. Roder, supra,* 33 Cal.3d at pp. 497–505.)

Give the bracketed sentence that begins with "When a person makes a statement, without qualification," on request if supported by the evidence. (Pen. Code, § 125.)

If there is sufficient evidence, give the bracketed paragraph that begins with "If the defendant attempted to correct." (*People v. Baranov* (1962) 201 Cal.App.2d 52, 60–61 [19 Cal.Rptr. 866].)

AUTHORITY

- Elements. Pen. Code, § 118a.
- Oath Defined. Pen. Code, § 119.
- Irregular Oath Not a Defense. Pen. Code, § 121.
- Knowledge of Materiality Not Necessary. Pen. Code, § 123.
- Completion of Deposition, Affidavit, or Certificate. Pen. Code, § 124; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247 [108 Cal.Rptr.2d 123].
- Unqualified Statement Equivalent to False Statement. Pen. Code, § 125.
- Material Defined. *People v. Pierce* (1967) 66 Cal.2d 53, 61 [56 Cal.Rptr. 817, 423 P.2d 969]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260]; *People v. Rubio* (2004) 121 Cal.App.4th 927, 930–934 [17 Cal.Rptr.3d 524].
- Materiality Is Element to Be Decided by Jury. *People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027]; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1576 [60 Cal.Rptr.2d 323].
- Specific Intent to Testify Falsely Required. *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584 [181 Cal.Rptr. 848]; see also *People v.*

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Hagen (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563] [discussing intent requirement for perjury].

- Good Faith Belief Statement True Negates Intent. *People v. Von Tiedeman* (1898) 120 Cal. 128, 134 [52 P. 155] [cited with approval in *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563]]; *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 43 [205 Cal.Rptr. 247].
- Unanimity. *People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 56–81.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings,* § 40.07[6] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Perjury. *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356].

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2640, Perjury.

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E. THREATENING OR RESISTING OFFICER

2650. Threatening a Public Official

The defendant is charged [in Count ____] with threatening a public official.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willingly (threatened to kill/ [or] threatened to cause serious bodily harm to) (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>* **[or a member of the immediate family of (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>***];**
2. **When the defendant acted, (he/she) intended that (his/her) statement be taken as a threat;**
3. **When the defendant acted, (he/she) knew that the person (he/she) threatened was (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>* **[or a member of the immediate family of (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>***];**
4. **When the defendant acted, (he/she) had the apparent ability to carry out the threat;**

[AND]

5. **The person threatened reasonably feared for (his/her) safety [or for the safety of (his/her) immediate family](;/.)**

<Give element 6 if directed at a person specified in Pen. Code, § 76(d) or (e).>

[AND

6. **The threat was directly related to the _____'s** *<insert title of person specified in Pen. Code, § 76(d) or (e)>* **performance of (his/her)** ***job duties*****.]**

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

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[When the person making the threat is an incarcerated prisoner with a stated release date, the *ability to carry out the threat* includes the ability to do so in the future.]

[*Serious bodily harm* includes serious physical injury or serious traumatic condition.]

[*Immediate family* includes a spouse, parent, or child[, or anyone who has regularly resided in the household for the past six months].]

[*Staff of a judge* includes court officers and employees[, as well as commissioners, referees, and retired judges sitting on assignment].]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements and Definitions. Pen. Code, § 76.
- Reasonable Fear by Victim Is Element. *People v. Andrews* (1999) 75 Cal.App.4th 1173, 1178 [89 Cal.Rptr.2d 683].
- Statute Constitutional. *People v. Gudger* (1994) 29 Cal.App.4th 310, 321 [34 Cal.Rptr.2d 510].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11A[1][b] (Matthew Bender).

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LESSER INCLUDED OFFENSES

An offense under Penal Code section 71, threatening a public officer to prevent him or her from performing his or her duties, may be a lesser included offense. However, there is no case law on this issue.

RELATED ISSUES

Threat Must Convey Intent to Carry Out

"Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which 'convincingly express an intention of being carried out.' . . . [¶]. . . Thus, section 76 . . . adequately expresses the notion that the threats proscribed are only those 'so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.' " [citations omitted] (*People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; see also *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007].)

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2651. Trying to Prevent an Executive Officer From Performing Duty

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The defendant is charged [in Count ____] with trying to (prevent/ [or] deter) an executive officer from performing that officer's duty.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty;**

AND

2. **When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., peace officer, commissioner, etc.*> is an *executive officer*.]

The executive officer does not need to be performing his or her job duties at the time the threat is communicated.

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else. The defendant must, however, intend that (his/her) statement be taken as a threat by the intended victim.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

**[A sworn member of _____ <*insert name of agency that employs peace officer*>, authorized by _____ <*insert*

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appropriate section from Pen. Code, § 830 et seq.> **to** _____ <*describe statutory authority*>**, is a *peace officer*.]**

[The duties of (a/an) _____ <*insert title of officer specified in Pen. Code, § 830 et seq.*> **include** _____ <*insert job duties*>**.]**

<*When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.*>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

For this offense, "the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made." (*In re Manuel G., supra,* 16 Cal.4th at p. 817.) Thus, if the evidence supports the conclusion that the defendant attempted to deter the officer's current performance of a duty, the court should instruct on the lawfulness of that duty. *(Ibid.)* Where the evidences supports the conclusion that the defendant attempted to deter the officer from performing a duty in the future, the court should only instruct on the lawfulness of that future duty. *(Ibid.)*

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If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer.*

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.
- Specific Intent Required. *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Immediate Ability to Carry Out Threat Not Required. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Lawful Performance Element to Attempting to Deter. *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Statute Constitutional. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 119.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11A[1][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting to deter an officer. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400].)

RELATED ISSUES

Statute as Written Is Overbroad

The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both "willfully" and "unlawfully." (*People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895–896 [199 Cal.Rptr. 150].)

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State of Mind of Victim Irrelevant

Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Hines* (1997) 15 Cal.4th 997, 1061, fn. 15 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

Immediate Ability to Carry Out Threat Not Required

"As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no *immediate* danger that they will be carried out." (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388] [quoting *In re M.S.* (1995) 10 Cal.4th 698, 714 [42 Cal.Rptr.2d 355, 896 P.2d 1365], citation and internal quotation marks removed, emphasis in original]; see also *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

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2652. Resisting an Executive Officer in Performance of Duty

The defendant is charged [in Count ____] with resisting an executive officer in the performance of that officer's duty.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] used force [or violence] to resist an executive officer;**
2. **When the defendant acted, the officer was performing (his/her) lawful duty;**

AND

3. **When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.**

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., peace officer, commissioner, etc.*> is an *executive officer.*]

[A sworn member of _____ <*insert name of agency that employs peace officer*>, authorized by _____ <*insert appropriate section from Pen. Code, § 830 et seq.*> to _____ <*describe statutory authority*>, is a *peace officer.*]

[The duties of (a/an) _____ <*insert title of officer specified in Pen. Code, § 830 et seq.*> include _____ <*insert job duties*>.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.
- General Intent Offense. *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer. *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 119.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[2] (Matthew Bender).

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LESSER INCLUDED OFFENSES

Penal Code section 148(a) may be a lesser included offense.

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2653. Taking Firearm or Weapon While Resisting Peace Officer or Public Officer

The defendant is charged [in Count ____] with taking a (firearm/ weapon) from a (peace/public) officer while (resisting[,]/ obstructing[,]/ [or] delaying) the officer in performing or attempting to perform (his/her) duties.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **_____ <*insert officer's name, excluding title*> was a (peace/public) officer lawfully performing or attempting to perform (his/her) duties as a (peace/public) officer;**
2. **The defendant willfully (resisted[,]/obstructed[,]/ [or] delayed) _____ <*insert officer's name, excluding title*> in the performance of or attempt to perform those duties;**
3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____ <*insert officer's name, excluding title*> was a (peace/public) officer performing or attempting to perform (his/her) duties;**

[AND]

4. **While the defendant (resisted[,]/obstructed[,]/ [or] delayed) _____ <*insert officer's name, excluding title*>, the defendant took or removed a (firearm/weapon) from _____'s <*insert officer's name, excluding title*> person [or immediate presence](;/.)**

<Give element 5 when instructing on self-defense or defense of another.>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

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[The term *firearm* is defined in another instruction to which you should refer.]

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.**]**

[An officer or employee of _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**

[The duties of (a/an) _____ *<insert title of peace or public officer>* **include** _____ *<insert job duties>*.**]**

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People*

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v. White (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance by a public officer is an issue, the court must draft an appropriate instruction depending on the duties of the officer.

Give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Related Instructions

CALCRIM No. 2654, *Intentionally Taking or Attempting to Take Firearm From Peace Officer or Public Officer*.

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AUTHORITY

- Elements. Pen. Code, § 148(b) & (c); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21] [elements of Pen. Code, § 148(a) offense]; *Nuno v. County of San Bernardino* (1999) 58 F.Supp.2d 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207] [knowledge that other person is an officer].
- Firearm Defined. Pen. Code, § 12001(b).
- Multiple Violations. Pen. Code, § 148(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Public Officer. See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined. Gov. Code, § 82048; see *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421 [286 Cal.Rptr. 684].
- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- General Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21]; *People v. Matthews* (1999) 70 Cal.App.4th 164, 175 [82 Cal.Rptr.2d 502].
- "Take" or "Remove" Defined. *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [82 Cal.Rptr.2d 502].
- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Removal of Firearm or Weapon. Pen. Code, §§ 663, 148(b) & (c).
- Misdemeanor Resisting Arrest. Pen. Code, § 148(a)(1).

RELATED ISSUES

Multiple Violations

A person may be convicted of multiple violations of this section if there are multiple officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

Other Forms of Resistance or Interference

It is a misdemeanor under Penal Code section 148(a)(1) to willfully resist, delay, or obstruct any emergency medical technician in discharging or attempting to discharge his or her duties of employment. (See Health & Saf. Code, § 1797 [defining emergency medical technician].) It is also a misdemeanor under Penal Code section 148(a)(2) to knowingly and maliciously interrupt, disrupt, impede, or otherwise interfere with the transmission of a communication over a public safety radio frequency.

(New January 2006)

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2654. Intentionally Taking or Attempting to Take Firearm From Peace Officer or Public Officer

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The defendant is charged [in Count ____] with intentionally (taking/ [or] attempting to take) a firearm from a (peace/public) officer while the officer was performing (his/her) duties.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **_____ <*insert officer's name, excluding title*> was a (peace/public) officer lawfully performing (his/her) duties as a (peace/public) officer;**
2. **The defendant (took or removed/ [or] attempted to take or remove) a firearm from _____'s <*insert officer's name, excluding title*> person [or immediate presence];**
3. **When the defendant acted, (he/she) intended to take or remove the firearm from _____'s <*insert officer's name, excluding title*> person [or immediate presence];**

[AND]

4. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____ <*insert officer's name, excluding title*> was a (peace/public) officer performing (his/her) duties(;/.)**

<Give element 5 when instructing on self-defense or defense of another>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

To prove that the defendant intended to take or remove a firearm from _____ <*insert officer's name, excluding title*>, the People must prove [at least one of] the following:

[1. The defendant unfastened _____'s <*insert officer's name, excluding title*> holster strap.]

[2. The defendant partially removed the firearm from _____'s <*insert officer's name, excluding title*> holster.]

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[3. The defendant released the safety on _____'s <*insert officer's name, excluding title*> firearm.]

[4. (a) The defendant said that (he/she) intended to remove the firearm from _____ <*insert officer's name, excluding title*>; (b) the defendant actually touched the firearm; and (c) an independent witness has given testimony that you believe, which supports the conclusion that the defendant made the statement about (his/her) intent and actually touched the firearm.]

[5. (a) The defendant actually had (his/her) hand on the firearm; (b) the defendant tried to take it away from _____ <*insert officer's name, excluding title*>, who was holding it; and (c) an independent witness has given testimony that you believe, which supports the conclusion that the defendant actually had (his/her) hand on the firearm and tried to take it away from the officer.]

[6. The defendant's fingerprint[s] (was/were) found on the firearm or holster.]

[7. Physical evidence authenticated by a scientifically verifiable procedure establishes that the defendant touched the firearm.]

[8. _____'s <*insert officer's name, excluding title*> firearm fell during a struggle and the defendant attempted to pick it up.]

[A person may intend to take a weapon from an officer without intending to permanently deprive the officer of the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction to which you should refer.]

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> is

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a *peace officer* if _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>**.]**

[An officer or employee of _____ <*insert name of state or local government agency that employs public officer*> **is a *public officer*.]**

[The duties of (a/an) _____ <*insert title of peace or public officer*> **include** _____ <*insert job duties*>**.]**

<*When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.*>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Depending on the evidence in the case, give the appropriate bracketed paragraph or paragraphs describing direct but ineffectual acts that establish defendant's specific intent to remove or take a firearm. (See Pen. Code, § 148(d)(1)–(8).)

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v.*

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Olguin (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance by a public officer is an issue, the court must draft an appropriate instruction depending on the duties of the officer.

Give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Related Instructions

CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer.*

CALCRIM No. 1801, *Theft: Degrees* (theft of firearm from an officer).

AUTHORITY

- Elements. Pen. Code, § 148(d); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21] [elements of Pen. Code, § 148(a) offense]; *Nuno v. County of San Bernardino* (1999) 58

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F.Supp. 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207] [knowledge that other person is an officer].

- Firearm Defined. Pen. Code, § 12001(b).
- Multiple Violations. Pen. Code, § 148(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Public Officer. See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338] ["public officers" is broader category than "peace officers"], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined. Gov. Code, § 82048; see *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421 [286 Cal.Rptr. 684].
- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].
- "Take" or "Remove" Defined. See *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [82 Cal.Rptr.2d 502] [in context of Pen. Code, § 148(a)].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3][b] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer*.

(New January 2006)

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2655. Causing Death or Serious Bodily Injury While Resisting Peace Officer

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The defendant is charged [in Count ____] with causing (the death of/serious bodily injury to) a peace officer performing (his/her) duties.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*insert officer's name, excluding title*> **was a peace officer lawfully performing or attempting to perform (his/her) duties as a peace officer;**
2. **The defendant willfully resisted** _____ <*insert officer's name, excluding title*> **in the performance of or the attempt to perform (his/her) duties;**
3. **When the defendant acted, (he/she) knew, or reasonably should have known, that** _____ <*insert officer's name, excluding title*> **was a peace officer performing or attempting to perform (his/her) duties;**
4. _____**'s** <*insert officer's name, excluding title*> **actions were reasonable, based on the facts or circumstances confronting (him/her) at the time;**
5. **The detention and arrest of (the defendant/**_____ <*insert name of person other than defendant who was arrested*>**) were lawful and there was probable cause to detain;**

[AND]

6. **The defendant's willful resistance caused (the death of/serious bodily injury to)** _____ <*insert officer's name, excluding title*>**(;/.)**

<*Give element 7 when instructing on self-defense or defense of another.*>

[AND

7. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

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Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

In order to prove that _____'s <*insert officer's name, excluding title*> **(death/serious bodily injury) was *caused* by the defendant's willful resistance, the People must prove that:**

1. **A reasonable person in the defendant's position would have foreseen that (his/her) willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury;**
2. **Defendant's willful resistance was a direct and substantial factor in causing _____'s** <*insert officer's name, excluding title*> **(death/serious bodily injury);**

AND

3. **_____'s** <*insert officer's name, excluding title*> **(death/serious bodily injury) would not have happened if the defendant had not willfully resisted _____** <*insert officer's name, excluding title*> **from performing or attempting to perform (his/her) duties.**

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused _____'s <*insert officer's name, excluding title*> **(death/serious bodily injury).**

[Willful resistance may include fleeing from the officer.]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> **is a *peace officer*.]**

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> **is a *peace officer* if _____**<*insert description of facts necessary to*

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make employee a peace officer, e..g, "designated by the director of the agency as a peace officer">.]

[The duties of (a/an) _____ <*insert title of peace officer*> **include** _____ <*insert job duties*>.]

<*When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.*>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

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The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

AUTHORITY

- Elements. Pen. Code, § 148.10(a) & (b).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Serious Bodily Injury Defined. Pen. Code, §§ 148.10(d), 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Willful Resistance Includes Flight. *People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1535 [34 Cal.Rptr.3d 481].
- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 21.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3][b] (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Misdemeanor Resisting Arrest. Pen. Code, § 148(a)(1).

RELATED ISSUES

Exclusions

Penal Code section 148.10 "does not apply to conduct that occurs during labor picketing, demonstrations, or disturbing the peace." (Pen. Code, § 148.10(c).)

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2656. Resisting Peace Officer, Public Officer, or EMT

The defendant is charged [in Count ____] with (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/ emergency medical technician) in the performance or attempted performance of (his/her) duties.

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ <*insert name, excluding title*> **was (a/an) (peace officer/public officer/emergency medical technician) lawfully performing or attempting to perform (his/her) duties as a (peace officer/public officer/emergency medical technician);**
2. **The defendant willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ <*insert name, excluding title*> in the performance or attempted performance of those duties;**

AND

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____ <*insert name, excluding title*> was (a/an) (peace officer/public officer/emergency medical technician) performing or attempting to perform (his/her) duties.**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A person who is employed as a police officer by _____ <*insert name of agency that employs police officer*> is a *peace officer*.]

[A person employed by _____ <*insert name of agency that employs peace officer, e.g., "the Department of Fish and Game"*> is a *peace officer* if _____ <*insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"*>.]

[An officer or employee of _____ <*insert name of state or local government agency that employs public officer*> is a *public officer*.]

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[An *emergency medical technician* is someone who holds a valid certificate as an emergency medical technician.]

[The duties of (a/an) _____ <*insert title of peace officer, public officer, or emergency medical technician*> **include** _____ <*insert job duties*>**.]**

<*When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.*>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ <*insert name, excluding title*> **by doing the following:** _____ <*insert description of acts when multiple acts alleged*>**. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.]**

[If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) the officer if all the other requirements are met.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

"[I]f a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section." (*People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].) An unlawful arrest includes both an arrest made without legal grounds and an arrest made with excessive force. (*Id.* at p. 167.) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an

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engaged-in-duty element." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct that the defendant is not guilty of the offense charged if the arrest was unlawful. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].)

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. When giving the portion of CALCRIM No. 2670 on the "use of force," the court **must** either delete the following sentence or specify that this sentence does not apply to a charge of violating Penal Code section 148: "If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Pen. Code, § 834a does not apply to charge under section 148].)

If the prosecution alleges multiple, distinct acts of resistance, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].) Give the bracketed paragraph that begins with "The People allege that the defendant."

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title* . . . > include" on request. The court may insert a description of the alleged victim's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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If the facts indicate passive resistance to arrest, give the bracketed sentence that begins with "If a person goes limp." (*In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].)

AUTHORITY

- Elements. Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- General-Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- Knowledge Required. *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207].
- Multiple Violations Permissible If Multiple Officers. Pen. Code, § 148(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Emergency Medical Technician Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Passive Resistance to Arrest. *In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].
- Unanimity. *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–19.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3][b] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

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F. LAWFUL PERFORMANCE

2670. Lawful Performance: Peace Officer

The People have the burden of proving beyond a reasonable doubt that _____ <*insert name, excluding title*> was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert name[s] of all offense[s] with lawful performance as an element*>.

A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention).

<A. Unlawful Detention>

[A peace officer may legally detain someone if [the person consents to the detention or if]:

1. **Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;**

AND

2. **A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

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Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.

In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.

<Arrest without warrant for most misdemeanors or infractions>

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

<Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence; see Bench Notes>

[In order for an officer to lawfully arrest someone for (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*) **without a warrant, the officer must have probable cause to believe the person to be arrested committed (a/an) (felony/ [or]** _____ *<insert misdemeanor not requiring commission in officer's presence>*). **However, it is not required that the offense be committed in the officer's presence.]**

_____ *<insert crime that was basis for arrest>* **is (a/an) (felony/misdemeanor/infraction).**

<Entering home without warrant>

[In order for an officer to enter a home to arrest someone without a warrant [and without consent]:

1. **The officer must have probable cause to believe that the person to be arrested committed a crime and is in the home;**

AND

2. **Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life

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or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which he or she is being arrested if he or she asks for that information.]]]

<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him.]]

If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] ["disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element"]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C that begins with "If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with "However, you may not find the defendant guilty of resisting arrest."

When giving the bracketed section under the heading "A. Unlawful Detention," if there is a factual issue about whether the person was in fact "detained," the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed "B. Unlawful Arrest," two options are provided for arrests without a warrant. The general rule is that an officer may not make

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an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading "Arrest without warrant for most misdemeanors or infraction." If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer's presence give the bracketed paragraph under the heading "Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence." The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. *(Ibid.)*

AUTHORITY

- Instructional Duty. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Lawful Detention. *People v. Celis* (2004) 33 Cal.4th 667, 674–675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].
- Lawful Arrest. Pen. Code, §§ 834–836, 841.
- Probable Cause Defined. *People v. Celis* (2004) 33 Cal.4th 667, 673 [16 Cal.Rptr.3d 85, 93 P.3d 1027]; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer's Training and Experience Relevant. *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention. Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home. *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743]; *People v. Ramey* (1976) 16

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Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].

- Reasonable Force. Pen. Code, §§ 692, 693.
- Excessive Force Makes Arrest Unlawful. *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].

Secondary Sources

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* §§ 11.01–11.06 (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1], [2] (Matthew Bender).

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving "a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].) On the other hand, "the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement." (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. *(Ibid.)*

Lawfulness of Officer's Conduct Based on Objective Standard

The rule "requires that the officer's lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant's mens rea." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant's belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

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2671. Lawful Performance: Custodial Officer

The People have the burden of proving beyond a reasonable doubt that _____ <*insert name, excluding title*> was lawfully performing (his/her) duties as a custodial officer. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert name[s] of all offense[s] with lawful performance as an element*>.

A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties.

Special rules control the use of force.

A custodial officer may use reasonable force in his or her duties to restrain a person, to overcome resistance, to prevent escape, or in self-defense.

If a person knows, or reasonably should know, that a custodial officer is restraining him or her, that person must not use force or any weapon to resist an officer's use of reasonable force.

If a custodial officer uses unreasonable or excessive force while restraining a person, that person may lawfully use reasonable force to defend himself or herself.

A person being restrained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v.*

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Gonzalez (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] ["disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element"]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

AUTHORITY

- Instructional Duty. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Reasonable Force. Pen. Code, §§ 692, 693.
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11–73.14 (Matthew Bender).

RELATED ISSUES

Lawfulness of Officer's Conduct Based on Objective Standard

The rule "requires that the officer's lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant's mens rea." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [74 Cal.Rptr. 713, 450 P.2d 33].) The defendant's belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

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2672. Lawful Performance: Resisting Unlawful Arrest With Force

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The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ <*insert other crime charged, e.g., resisting arrest*>) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.

However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of _____ <*insert crimes*>].

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- No Right to Forcibly Resist Arrest. Pen. Code, § 834a.

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- Applies to Arrest, Not Detention. *People v. Coffey* (1967) 67 Cal.2d 204, 221 [60 Cal.Rptr. 457, 430 P.2d 15]; *People v. Jones* (1970) 8 Cal.App.3d 710, 717 [87 Cal.Rptr. 625].
- Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer. *People v. Curtis* (1969) 70 Cal.2d 347, 355–356 [74 Cal.Rptr. 713, 450 P.2d 33]; *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].
- Use of Reasonable Force in Response to Excessive Force Is Complete Defense. *People v. White* (1980) 101 Cal.App.3d 161, 168 [161 Cal.Rptr. 541].
- May Not Be Convicted of Resisting Unlawful Arrest. *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541]; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10 [108 Cal.Rptr. 338].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11[2][b], 73.15[2] (Matthew Bender).

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2673. Pat-Down Search

An officer who has lawfully detained someone may conduct a carefully limited search of the detained person's outer clothing, in order to discover whether that person has a weapon. The officer may conduct this limited search only if he or she reasonably believes that the detained person may be armed and dangerous.

[If, during the search, the officer finds an object that feels reasonably like (a/an) (knife[,]/ [or] gun[,]/ [or] club[,]/ [or] _____ <*insert specific type of weapon*>), the officer may remove the object from the person's clothing.]

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- Stop and Frisk Permissible. *Terry v. Ohio* (1968) 392 U.S. 1, 30–31 [88 S.Ct. 1868, 20 L.Ed.2d 889]; *People v. Scott* (1976) 16 Cal.3d 242, 248 [128 Cal.Rptr. 39, 546 P.2d 327].
- Officer May Remove Object That Feels Like Typical Weapon. *People v. Collins* (1970) 1 Cal.3d 658, 663 [83 Cal.Rptr. 179, 463 P.2d 403]; *People v. Watson* (1970) 12 Cal.App.3d 130, 135 [90 Cal.Rptr. 483].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Illegally Obtained Evidence, § 249 et seq.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 10, *Investigative Detention,* §§ 10.01–10.06 (Matthew Bender).

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G. UNLAWFUL ASSEMBLY AND DISTURBING THE PEACE

2680. Courthouse Picketing

The defendant is charged [in Count ____] with (picketing/ [or] parading) near a courthouse.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (picketed/ [or] paraded) in or near a state court building;**

AND

2. **When the defendant acted, (he/she) did so with the intent (to interfere with, obstruct, or impede the administration of justice/ [or] to influence (a/an) (judge[,]/ [or] juror[,]/ [or] witness[,]/ [or] officer of the court) in the discharge of his or her duty).**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 169.
- Similar Statute Constitutional. *Cox v. Louisiana* (1964) 379 U.S. 559, 564 [85 S.Ct. 476, 13 L.Ed.2d 487] [upholding Louisiana statute nearly identical to Pen. Code, § 169].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 31.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

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2681. Disturbance of Public Meeting

The defendant is charged [in Count ____] with (disturbing/ [or] breaking up) a public meeting.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant intentionally committed acts that violated (implicit customs or usages of/ [or] explicit rules for governing) a public meeting that was not religious or political in nature;**
2. **The defendant knew or reasonably should have known that (his/her) acts violated those (customs[,]/ [or] usages[,]/ [or] rules);**

AND

3. **The defendant's acts substantially [and unlawfully] interfered with the conduct of the meeting.**

You may not find the defendant guilty of this crime unless you find that the defendant's acts themselves, not the message or expressive content of the acts, substantially interfered with the conduct of the meeting.

[When deciding whether the defendant knew or reasonably should have known that (his/her) acts violated the (implicit customs or usages of/ [or] explicit rules for governing) the meeting, you may consider whether someone warned or requested the defendant to stop (his/her) activities.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

On request, give the bracketed sentence that begins with "When deciding whether," if the meeting did not have explicit rules of governance. (*In re Kay* (1970) 1 Cal.3d 930, 945 [83 Cal.Rptr. 686, 464 P.2d 142].)

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AUTHORITY

- Elements. Pen. Code, § 403; *In re Kay* (1970) 1 Cal.3d 930, 941–943 [83 Cal.Rptr. 686, 464 P.2d 142].
- First Amendment Limitations on Statute. *In re Kay* (1970) 1 Cal.3d 930, 941–942 [83 Cal.Rptr. 686, 464 P.2d 142].
- Must Be Public Meeting. *Farraher v. Superior Court* (1919) 45 Cal.App. 4, 6 [187 P. 72].
- No Clear and Present Danger Requirement. *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1287–1288 [129 Cal.Rptr.2d 184].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

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2682. Inciting a Riot

The defendant is charged [in Count ____] with inciting a riot.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (did an act or engaged in conduct that encouraged a riot[,]/ [or] urged others to commit acts of force or violence[,]/ [or] urged others to burn or destroy property);**
2. **The defendant acted at a time and place and under circumstances that produced a clear, present, and immediate danger that (a riot would occur/ [or] acts of force or violence would happen/ [or] property would be burned or destroyed);**

AND

3. **When the defendant acted, (he/she) intended to cause a riot.**

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.

[The People do not have to prove that anyone actually (rioted/ [or] committed acts of force or violence/ [or] burned or destroyed property).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with "The People do not have to prove" on request.

AUTHORITY

- Elements. Pen. Code, § 404.6(a).

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- Riot Defined. Pen. Code, § 404.
- Statute Constitutional. *People v. Davis* (1968) 68 Cal.2d 481, 484–487 [67 Cal.Rptr. 547, 439 P.2d 651].
- Terms of Statute Understandable. *People v. Jones* (1971) 19 Cal.App.3d 437, 447 [96 Cal.Rptr. 795].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 14.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

RELATED ISSUES

Defendant Must Urge Others

To be guilty of inciting a riot, the defendant must urge others to commit acts of force or property destruction. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [215 Cal.Rptr. 1, 700 P.2d 782]; *In re Wagner* (1981) 119 Cal.App.3d 90, 106 [173 Cal.Rptr. 766].) Thus, in *In re Wagner, supra*, 119 Cal.App.3d at p. 106, the court held that the evidence was insufficient to establish incitement to riot where the defendant was observed throwing rocks at the police.

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2683. Participating in a Riot

The defendant is charged [in Count ____] with participating in a riot.

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully participated in a riot.

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, §§ 404, 405.
- Riot Defined. Pen. Code, § 404.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 13.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

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RELATED ISSUES

Prior Agreement Not Necessary

"It [is] not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of section 404." (*People v. Bundte* (1948) 87 Cal.App.2d 735, 743 [197 P.2d 823].) "Thus, it is the *concurrence* of unlawful action by individuals in the use, or threat to unlawfully use force or violence that constitutes the offense of riot. [Citation.] All persons who encourage, incite, promote, give support to or countenance a riot are principals in a riot." (*People v. Cipriani* (1971) 18 Cal.App.3d 299, 304 [95 Cal.Rptr. 722] [italics in original, citing *People v. Bundte, supra,* 87 Cal.App.2d at pp. 744–746].)

Mere Presence Not Sufficient

Mere presence alone does not make someone a rioter. (*People v. Bundte* (1948) 87 Cal.App.2d 735, 746 [197 P.2d 823].)

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2684. Participating in a Rout

The defendant is charged [in Count ____] with participating in a rout.

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully participated in a rout.

A *rout* occurs when two or more people, assembled and acting together, make an attempt to commit or advance toward committing an act that would be a riot if actually committed.

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, §§ 406, 408; *In re Wagner* (1981) 119 Cal.App.3d 90, 106 [173 Cal.Rptr. 766].
- Rout Defined. Pen. Code, § 406.
- Riot Defined. Pen. Code, § 404.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 10.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

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2685. Participating in an Unlawful Assembly

The defendant is charged [in Count ____] with participating in an unlawful assembly.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully participated in an unlawful assembly;**

AND

2. **The defendant knew that the assembly was unlawful when (he/she) participated.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *unlawful* assembly occurs when two or more people assemble together (to commit a crime/ [or] to do a lawful act in a violent manner).

[When two or more people assemble to do a lawful act in a violent manner, the assembly is not *unlawful* unless violence actually occurs or there is a clear and present danger that violence will occur immediately.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 407 defines an "unlawful assembly" as two or more people assembled together "to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner." The Supreme Court has held that "the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence." (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.) Because the assembly must in fact be violent

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or pose an immediate threat of violence, an assembly that is "boisterous or tumultuous" does not establish a violation of the statute. The committee has therefore eliminated these words from the instruction since they are archaic and potentially confusing.

AUTHORITY

- Elements. Pen. Code, §§ 407, 408.
- Unlawful Assembly Defined. Pen. Code, § 407.
- Assembly for Lawful Act Requires Violence or Clear and Present Danger of Violence. *In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.
- Specific Intent to Commit Unlawful or Violent Act Not Required. *People v. Kerrick* (1972) 86 Cal.App. 542, 551 [261 P. 756].
- Knowledge That Assembly Unlawful Required. *In re Wagner* (1981) 119 Cal.App.3d 90, 103–104 [173 Cal.Rptr. 766]; *Coverstone v. Davies* (1952) 38 Cal.2d 315, 320 [239 P.2d 876].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 11.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

(New January 2006)

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2686. Refusal to Disperse: Riot, Rout, or Unlawful Assembly

The defendant is charged [in Count ____] with refusal to disperse after being ordered to do so.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was present at the location of (a/an) (riot[,]/ [or] rout[,]/ [or] unlawful assembly);**
2. **A public officer lawfully ordered the defendant to disperse;**

[AND]

3. **The defendant willfully remained present at the location of the (riot[,]/ [or] rout[,]/ [or] unlawful assembly) after the order to disperse(;/.)**

<Give element 4 when instructing on the defense of being a public officer or person assisting an officer.>

[AND

4. **The defendant was not a public officer or a person assisting an officer in attempting to disperse the (riot[,]/ [or] rout[,]/ [or] unlawful assembly).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.]

[A *rout* occurs when two or more people, assembled and acting together, make an attempt to commit or advance toward committing an act that would be a riot if actually committed.]

[An *unlawful* assembly occurs when two or more people assemble together (to commit a crime/ [or] to do a lawful act in a violent manner).

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[When two or more people assemble to do a lawful act in a violent manner, the assembly is not *unlawful* unless violence actually occurs or there is a clear and present danger that violence will occur immediately.]]

(A/An) _____ <*insert description*> **is a *public officer*.**

A public officer *lawfully warns people to disperse* when the officer directs them, in the name of the People of the State, to immediately disperse. The officer is not required to use any particular words. However, the words used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. In addition, the officer must communicate the order in a reasonable way that ensures that the order is heard.

[The People do not have to prove that the defendant participated in the (riot[,]/ [or] rout[,]/ [or] unlawful assembly).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give element 4 if there is evidence that the defendant was a public officer or assisting a public officer.

Penal Code section 407 defines an "unlawful assembly" as two or more people assembled together "to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner." The Supreme Court has held that "the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence." (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.) Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is "boisterous or tumultuous" does not establish a violation of the statute. The committee has therefore eliminated these words from the instruction since they are archaic and potentially confusing.

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The jury must determine whether the person who allegedly gave the order was a public officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "public officer" (e.g., in the case of "peace officer," the court may state "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the person was a public officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

Give the bracketed sentence that begins with "The People do not have to prove" on request. (*In re Bacon* (1966) 240 Cal.App.2d 34, 49 [49 Cal.Rptr. 322].)

AUTHORITY

- Elements. Pen. Code, §§ 407, 409.
- Command to Disperse. Pen. Code, § 726.
- Riot Defined. Pen. Code, § 404.
- Rout Defined. Pen. Code, § 406.
- Unlawful Assembly Defined. Pen. Code, § 407.
- Assembly for Lawful Act Requires Violence or Clear and Present Danger of Violence. *In re Brown* (1973) 9 Cal.3d 612, 623 [49 Cal.Rptr. 322, 510 P.2d 1017]; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.
- No Particular Manner of Warning Required. *In re Bacon* (1966) 240 Cal.App.2d 34, 50–51 [49 Cal.Rptr. 322]; *People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308 [95 Cal.Rptr. 722]; *In re Wagner* (1981) 119 Cal.App.3d 90, 105 [173 Cal.Rptr. 766].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

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RELATED ISSUES

Penal Code Sections 409 and 416(a)

Penal Code section 409 applies to any person remaining at an unlawful assembly following an order to disperse, whether or not that person is involved in the violent or illegal activity. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Bacon* (1966) 240 Cal.App.2d 34, 49 [49 Cal.Rptr. 322].) Refusal to disperse is also punishable under Penal Code section 416(a). Penal Code section 416(a) applies only to those who have the specific intent to commit violent or unlawful acts but does not require that the gathering meet the definition of riot, rout, or unlawful assembly. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Wagner* (1981) 119 Cal.App.3d 90, 110–111 [173 Cal.Rptr. 766].) Use this instruction only for a charge of violating Penal Code section 409. If the defendant is charged under Penal Code section 416(a), give CALCRIM No. 2687, *Refusal to Disperse: Intent to Commit Unlawful Act*.

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2687. Refusal to Disperse: Intent to Commit Unlawful Act

The defendant is charged [in Count ____] with refusal to disperse after being ordered to do so.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant assembled with one or more other people;**
2. **The defendant intended to (disturb the public peace/ [or] commit a crime);**
3. **A public officer had probable cause to believe that the purpose of the assembly was unlawful;**
4. **The public officer lawfully warned the defendant to disperse;**

AND

5. **The defendant willfully remained present at the location after the order to disperse.**

[As used here, a person *intends to disturb the public peace* if he or she intends to commit overt acts that are themselves violent or that tend to incite others to violence.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

(A/An) _____ <*insert description*> **is a *public officer.***

A public officer *lawfully warns people to disperse* when the officer directs them, in the name of the People of the State, to immediately disperse. The officer is not required to use any particular words. However, the words used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. In addition, the officer must communicate the order in a reasonable way that ensures that the order is heard.

An officer has *probable cause* to believe that the purpose of the assembly is unlawful if the officer knows facts that would persuade someone of reasonable caution to believe that the

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people present intend to (immediately commit criminal or violent acts/ [or] incite others to immediately commit acts of violence).

In deciding whether the officer has probable cause, consider evidence of the officer's training and experience and all the circumstances the officer knew about at the time.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The jury must determine whether the person who allegedly gave the order was a public officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "public officer" (e.g., in the case of "peace officer," the court may state "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the person was a public officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

AUTHORITY

- Elements. Pen. Code, § 416(a).
- First Amendment Limitations on Statute. *Chambers v. Municipal Court* (1977) 65 Cal.App.3d 904, 909–911 [135 Cal.Rptr. 695].
- Command to Disperse. Pen. Code, § 726.
- No Particular Manner of Warning Required. *In re Bacon* (1966) 240 Cal.App.2d 34, 50–51 [49 Cal.Rptr. 322]; *People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308 [95 Cal.Rptr. 722]; *In re Wagner* (1981) 119 Cal.App.3d 90, 105 [173 Cal.Rptr. 766].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 15.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* §§ 144.21, 144.22 (Matthew Bender).

RELATED ISSUES

Penal Code Sections 409 and 416(a)

Penal Code section 409 applies to any person remaining at an unlawful assembly following an order to disperse, whether or not that person is involved in the violent or illegal activity. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Bacon* (1966) 240 Cal.App.2d 34, 49 [49 Cal.Rptr. 322].) Refusal to disperse is also punishable under Penal Code section 416(a). Penal Code section 416(a) applies only to those who have the specific intent to commit violent or unlawful acts but does not require that the gathering meet the definition of riot, rout, or unlawful assembly. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Wagner* (1981) 119 Cal.App.3d 90, 110–111 [173 Cal.Rptr. 766].) Use this instruction only for a charge of violating Penal Code section 416(a). If the defendant is charged under Penal Code section 409, give CALCRIM No. 2686, *Refusal to Disperse: Riot, Rout, or Unlawful Assembly*.

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2688. Disturbing the Peace: Fighting or Challenging Someone to Fight

The defendant is charged [in Count ____] with disturbing the peace.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully [and unlawfully] (fought/ [or] challenged someone else to fight);**

[AND]

2. **The defendant and the other person were (in a public place/in a building or on the grounds of _____ <*insert description of school from Pen. Code, § 415.5*>) when (the fight occurred/ [or] the challenge was made)(;/.)**

<Give element 3 when instructing on self-defense or defense of another.>

[AND]

[3. The defendant did not act (in self-defense/ [or] in defense of someone else)(;/.)]

<Give element 4 when instructing on Pen. Code, § 415.5(f).>

[AND

(3/4). The defendant was not (a registered student at the school/ [or] a person engaged in lawful employee-related activity).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(1) or section 415.5(a)(1).

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If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on that defense. Give bracketed element 3, the phrase "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the defendant is charged under Penal Code section 415.5(a)(1), select "within a building or on the grounds of" in element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 4.

If the defendant is charged under Penal Code section 415(1), select "in a public place" in element 2. Do not give bracketed element 4.

AUTHORITY

- Elements. Pen. Code, §§ 415(1), 415.5(a)(1).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.22 (Matthew Bender).

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2689. Disturbing the Peace: Loud and Unreasonable Noise

The defendant is charged [in Count ____] with disturbing the peace.

To prove that the defendant is guilty of this crime, the People must prove that:

[1.] The defendant maliciously and willfully disturbed another person by causing loud and unreasonable noise(;/.)

<Give element 2 when instructing on Pen. Code, § 415.5(a)(2).>

[AND]

[2. The other person was in a building or on the grounds of _____ <*insert description of school from Pen. Code, § 415.5*> at the time of the disturbance(;/.)]

<Give element 3 when instructing on Pen. Code, § 415.5(f).>

[AND

(2/3). The defendant was not (a registered student of the school/ [or] a person engaged in lawful employee-related activity).]

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In order to *disturb another person by causing loud and unreasonable noise*, there must be either:

1. A clear and present danger of immediate violence;

OR

2. The noise must be used for the purpose of disrupting lawful activities, rather than as a means to communicate.

The People do not have to prove that the defendant intended to provoke a violent response.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(2) or section 415.5(a)(2).

If the defendant is charged under Penal Code section 415.5(a)(2), give bracketed element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 3.

If the defendant is charged under Penal Code section 415(1), give only element 1. Do not give bracketed elements 2 and 3.

AUTHORITY

- Elements. Pen. Code, §§ 415(2), 415.5(a)(2).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Maliciously Defined. Pen. Code, § 7(4).
- Loud and Unreasonable Noise Defined. *In re Brown* (1973) 9 Cal.3d 612, 618–621 [108 Cal.Rptr. 465, 510 P.2d 1017].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.22 (Matthew Bender).

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2690. Disturbing the Peace: Offensive Words

The defendant is charged [in Count ____] with disturbing the peace.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used offensive words that were inherently likely to provoke an immediate violent reaction;**

[AND]

2. **When the defendant used those words, (he/she) was (in a public place/in a building or on the grounds of _____** *<insert description of school from Pen. Code, § 415.5>*)**(;/.)**

<Give element 3 when instructing on Pen. Code, § 415.5(f).>

[AND

3. **The defendant was not (a registered student of the school/ [or] a person engaged in lawful employee-related activity).]**

A person *uses offensive words inherently likely to provoke an immediate violent reaction* if:

1. **He or she says something that is reasonably likely to provoke someone else to react violently;**

AND

2. **When he or she makes that statement, there is a clear and present danger that the other person will immediately erupt into violence.**

In deciding whether the People have proved both of these factors, consider all the circumstances in which the statement was made and the person to whom the statement was addressed.

The People do not have to prove that the defendant intended to provoke a violent response.

<Defense: Good Faith Belief Language Not Likely to Provoke>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the language (he/she) used was not

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inherently likely to provoke an immediate violent reaction. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe this to be true. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(3) or section 415.5(a)(3).

If the defendant is charged under Penal Code section 415.5(a)(3), select "within a building or on the grounds of" in element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 3.

If the defendant is charged under Penal Code section 415(3), select "in a public place" in element 2. Do not give bracketed element 3.

Defenses—Instructional Duty

If there is sufficient evidence to support the defense that the defendant reasonably believed that his or her words would not provoke, the court has a **sua sponte** duty to give the instruction on that defense. (See *In re John V.* (1985) 167 Cal.App.3d 761, 770 [213 Cal.Rptr. 503] [recognizing defense].)

AUTHORITY

- Elements. Pen. Code, §§ 415(3), 415.5(a)(3).
- Must Be Clear and Present Danger of Immediate Violence. *Cohen v. California* (1971) 403 U.S. 15, 17 [91 S.Ct. 1780, 29 L.Ed.2d 284]; *In re Brown* (1973) 9 Cal.3d 612, 618 [108 Cal.Rptr. 465, 510 P.2d 1017].
- Statement Must Be Uttered in Provocative Manner. *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 724–725 [124 Cal.Rptr. 507]*; In re John V.* (1985) 167 Cal.App.3d 761, 767–768 [213

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Cal.Rptr. 503]; *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50 [43 Cal.Rptr.2d 471].

- Context Must Be Considered. *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 724–725 [124 Cal.Rptr. 507]*; In re John V.* (1985) 167 Cal.App.3d 761, 767–768 [213 Cal.Rptr. 503]; *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50 [43 Cal.Rptr.2d 471].
- Intention to Cause Violence Not Required. *Cantwell v. Connecticut* (1940) 310 U.S. 296, 309 [60 S.Ct. 900, 84 L.Ed. 1213].
- Good Faith Defense. *In re John V.* (1985) 167 Cal.App.3d 761, 770 [213 Cal.Rptr. 503].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.22 (Matthew Bender).

RELATED ISSUES

Statement Made to Police Officer

"In determining whether section 415 subdivision (3) was violated, courts must consider the totality of the circumstances, including the status of the addressee. That the addressee was a police officer trained and obliged to exercise a higher degree of restraint than the average citizen is merely one factor to be considered along with the other circumstances." (*In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50 [43 Cal.Rptr.2d 471]; see also *People v. Callahan* (1985) 168 Cal.App.3d 631, 635 [214 Cal.Rptr. 294] [evidence showed officer "was neither offended . . . nor provoked"].)

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H. VIOLATION OF COURT ORDER

2700. Violation of Court Order

The defendant is charged [in Count ____] with violating a court order.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **A court [lawfully] issued a written order that the defendant _____ <*insert description of order*>;**
2. **The defendant knew about the court order and its contents;**
3. **The defendant had the ability to follow the court order;**

AND

4. **The defendant willfully violated the court order.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The People must prove that the defendant knew about the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for

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violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–820; *In re Berry, supra,* 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

Penal Code section 166(b)(1) provides for an increased sentence if the defendant was previously convicted of stalking and violated a court order "by willfully contacting a victim by phone or mail, or directly." If the prosecution alleges this factor, in element 1, the court should state that the court ordered the defendant "not to contact _____ <*insert name of victim in stalking case*> directly, by phone, or by mail," or something similar. The jury must also determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

If the prosecution alleges that the defendant violated a protective order in a case involving domestic violence (Pen. Code, §§ 166(c)(1), 273.6), do not use this instruction. Give CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

Give the bracketed paragraph that begins with "The People must prove that the defendant knew" on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

AUTHORITY

- Elements. Pen. Code, § 166(a)(4) & (b)(1).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

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- Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804 [50 Cal.Rptr.2d 74, 910 P.2d 1366], 816–817; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 1, *The California Defense Advocate,* § 1.30 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4]; Ch. 144, *Crimes Against Order,* § 144.10[1] (Matthew Bender).

RELATED ISSUES

Violation of Order to Pay Support—Court May Suspend Proceedings

If the defendant is charged with violating Penal Code section 166(a)(4) based on a failure to pay child, spousal, or family support, the court may suspend criminal proceedings if the defendant acknowledges his or her obligation to pay and posts a bond or other surety. (Pen. Code, § 166.5.)

Person Not Directly Bound by Order

A person who is not directly bound by a court order may nevertheless violate Penal Code section 166(a)(4) if he or she acts in concert with a

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person who is directly bound by the order. (*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 978–979 [168 P.2d 497]; *Berger v. Superior Court* (1917) 175 Cal. 719, 721 [167 P. 143].) "[A] nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained." (*People v. Conrad* (1997) 55 Cal.App.4th 896, 903 [64 Cal.Rptr.2d 248] [italics in original].) The mere fact that the nonparty shares the same purpose as the restrained party is not sufficient. *(Ibid.)* "An enjoined party . . . has to be demonstrably implicated in the nonparty's activity." *(Ibid.)*

Violating Condition of Probation

A defendant may not be prosecuted under Penal Code section 166(a)(4) for violating a condition of probation. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628].)

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2701. Violation of Court Order: Protective Order or Stay Away

The defendant is charged [in Count ____] with violating a court order.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **A court [lawfully] issued a written order that the defendant _____ <*insert description of content of order*>;**
2. **The court order was a (protective order/stay-away court order/_____ <*insert other description of order from Pen. Code, § 166(c)(3) or § 273.6(c)*>), issued [in a criminal case involving domestic violence and] under _____ <*insert code section under which order made*>;**
3. **The defendant knew of the court order;**
4. **The defendant had the ability to follow the court order;**

AND

5. **The defendant willfully violated the court order.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

[*Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).

***Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear**

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of imminent serious bodily injury to himself or herself or to someone else.]

[The term *cohabitants* means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/ domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–820; *In re Berry, supra,* 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

In element 2, give the bracketed phrase "in a criminal case involving domestic violence" if the defendant is charged with a violation of Penal

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Code section 166(c)(1). In such cases, also give the bracketed definition of "domestic violence" and the associated terms.

In element 2, if the order was not a "protective order" or "stay away order" but another type of qualifying order listed in Penal Code section 166(c)(3) or 273.6(c), insert a description of the type of order from the statute.

In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)

Give the bracketed paragraph that begins with "The People must prove that the defendant knew" on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

If the prosecution alleges that physical injury resulted from the defendant's conduct, in addition to this instruction, give CALCRIM No. 2702, *Violation of Court Order: Protective Order or Stay Away—Physical Injury*. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and a current offense involving an act of violence or credible threat of violence, in addition to this instruction, give CALCRIM No. 2703, *Violation of Court Order: Protective Order or Stay Away—Act of Violence*. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

AUTHORITY

- Elements. Pen. Code, §§ 166(c)(1), 273.6.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].

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- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- Abuse Defined. Pen. Code, § 13700(a).
- Cohabitant Defined. Pen. Code, § 13700(b).
- Domestic Violence Defined. Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 63.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4] (Matthew Bender).

COMMENTARY

Penal Code section 166(c)(1) also includes protective orders and stay aways "issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence . . . ." However, in *People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628], the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.

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LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2700, *Violation of Court Order*.

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2702. Violation of Court Order: Protective Order or Stay Away—Physical Injury

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If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant's conduct resulted in physical injury to another person.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the prosecution alleges that the defendant's violation of the court order resulted in physical injury, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the allegation.

AUTHORITY

- Elements. Pen. Code, §§ 166(c)(2), 273.6(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4] (Matthew Bender).

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2703. Violation of Court Order: Protective Order or Stay Away—Act of Violence

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If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant's conduct involved an act of violence [or a credible threat of violence].

[A person makes a *credible threat of violence* when he or she willfully and maliciously communicates a threat to a victim of or a witness to the conduct that violated a court order. The threat must be to use force or violence against that person or that person's family. The threat must be made with the intent and the apparent ability to carry out the threat in a way to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.]

[Someone commits an act *willfully* when he or she does it willingly or on purpose.]

[Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony for violating a court order based on a prior conviction and an act of violence or credible threat of violence, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away.*

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the allegation.

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The court must also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements. Pen. Code, §§ 166(c)(4), 273.6(d).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4] (Matthew Bender).

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I. CRIMES INVOLVING PRISONERS

(i) Assault and Battery

2720. Assault by Prisoner Serving Life Sentence

The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. The defendant acted with malice aforethought;

[AND]

<Alternative 6A—defendant sentenced to life term>

[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

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<Alternative 6B—defendant sentenced to life and to determinate term>

[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

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[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

There are two kinds of *malice aforethought*, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act.**
2. **The natural consequences of the act were dangerous to human life.**
3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life.**

AND

4. **(He/She) deliberately acted with conscious disregard for human life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act is committed. It does not require deliberation or the passage of any particular period of time.

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

Give the bracketed definition of "application of force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, give the bracketed definition of "sentenced to a term in state prison." Within that definition, give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless "the person subjected to such assault does not die within a year and a day after" the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

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Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements of Assault by Life Prisoner. Pen. Code, § 4500.
- Elements of Assault With Deadly Weapon or Force Likely. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder. *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].
- Malice Defined. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].

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- Ill Will Not Required for Malice. *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].
- Undergoing Sentence of Life. *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 58–60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault. Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. The court based its on conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.

RELATED ISSUES

Status as Life Prisoner Determined on Day of Alleged Assault

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836]; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does

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not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell), supra,* 99 Cal.App.4th at p. 1341; *Graham v. Superior Court, supra,* 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life

This statute applies to "[e]very person undergoing a life sentence . . . ." (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836], the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating "a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had 'nothing left to lose' by committing the assault." *(Ibid.)*

Error to Instruct on General Definition of Malice and General Intent

"Malice," as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. *(Ibid.)*

(New January 2006)

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2721. Assault by Prisoner

The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

[AND]

5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND

6. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

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[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

A person is *confined in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/ committed to the Department of (the Youth Authority/ Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a

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prisoner who has been released on parole is not *confined in a state prison*.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

Give the bracketed definition of "application of force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner. Pen. Code, § 4501.

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- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 61.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; see *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault. Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

RELATED ISSUES

Not Serving a Life Sentence

Previously, this statute did not apply to an inmate "undergoing a life sentence." (See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].) The statute has been amended to remove this restriction, effective January 1, 2005. If the case predates this amendment, the court must add to the end of element 5, "for a term other than life."

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2722. Battery by Gassing

The defendant is charged [in Count ____] with battery by gassing.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was (serving a sentence in a [California] state prison/confined in a local detention facility);**
2. **While so confined, the defendant intentionally committed an act of gassing, that is, (he/she) (placed[,]/ [or] threw[,]/ [or] caused to be placed or thrown) (human excrement/ human urine/human bodily fluids or substances/a mixture containing human bodily substances) on the body of (a peace officer/an employee of a (state prison/local detention facility));**

AND

3. **The (excrement/urine/bodily fluids or substances/mixture) actually made contact with the skin [or membranes] of (a peace officer/an employee of a (state prison/local detention facility)).**

[A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of (the Youth Authority/ Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]]

[A (county jail/city jail/_____ <*insert description*>) is a *local detention facility*.]

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[A sworn member of _____ <*insert name of agency that employs peace officer*>, authorized by _____ <*insert appropriate section from Pen. Code, § 830 et seq.*> to _____ <*describe statutory authority*>, is a *peace officer*.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the battery is charged under Penal Code section 4501.1, in element 1, use the phrase "serving a sentence in state prison" and the bracketed definition of this phrase. If the battery is charged under Penal Code section 243.9, in element 1, give the language referencing a "local detention facility" and the bracketed definition of local detention facility.

When giving the definition of "serving a sentence in a state prison," give the bracketed portion that begins "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

The jury must determine whether the alleged victim was a peace officer. (People v. Flood (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.9, 4501.1.
- Confined in State Prison Defined. Pen. Code, § 4504.
- Local Detention Facility Defined. Pen. Code, § 6031.4.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 62.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

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2723. Battery by Prisoner on Nonprisoner

The defendant is charged [in Count ____] with battery on someone who was not a prisoner.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully touched _____ <*insert name of person allegedly battered, excluding title of law enforcement agent*> in a harmful or offensive manner;**
2. **When (he/she) acted, the defendant was serving a sentence in a [California] state prison;**

[AND]

3. **_____ <*insert name of person allegedly battered, excluding title of law enforcement agent*> was not serving a sentence in state prison(;/.)**

<Give element 4 when self-defense or defense of another is an issue raised by the evidence.>

[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of (the Youth Authority/ Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the

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validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023 [149 Cal.Rptr. 134]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If there is evidence of excessive force, give bracketed element 4, the last bracketed paragraph, and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

Give the bracketed paragraph on indirect touching if that is an issue.

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the

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bracketed second or third sentence, if requested and relevant based on the evidence.

Related Instructions

CALCRIM No. 960, *Simple Battery*.

AUTHORITY

- Elements of Battery by Prisoner on Nonprisoner. Pen. Code, § 4501.5.
- Elements of Battery. Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–15, 57.

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Battery. Pen. Code, § 242.
- Assault. Pen. Code, § 240.

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(ii) Hostage Taking and Rioting

2735. Holding a Hostage

The defendant is charged [in Count ____] with holding a hostage.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (held a person hostage/ [or] held a person against his or her will, by force or threat of force, in defiance of official orders) inside a (prison/facility under the jurisdiction of the Department of Corrections);**

AND

2. **When the defendant acted, (he/she) was serving a sentence in a [California] state prison.**

A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of (the Youth Authority/ Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

AUTHORITY

- Elements. Pen. Code, § 4503.
- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 255.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.30[5], 91.60[2][b] (Matthew Bender).

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2736. Inciting a Riot in a Prison or Jail

The defendant is charged [in Count ____] with inciting a riot [in a (state prison/county jail)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (did an act [or engaged in conduct] that encouraged a riot[,]/ [or] urged others to commit acts of force or violence[,]/ [or] urged others to (burn/ [or] destroy) property);**
2. **The defendant acted at a time and place and under circumstances that produced a clear, present, and immediate danger that (acts of force or violence would happen/ [or] property would be (burned/ [or] destroyed));**
3. **When the defendant acted, (he/she) intended to cause a riot;**
4. **As a result of the defendant's action [or conduct], a riot occurred [in a (state prison/county jail)];**

AND

5. **The riot resulted in serious bodily injury to someone.**

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats. [A disturbance of the public peace may happen in any place of confinement, including a (state prison/ [or] county jail).]

A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

[To *commit acts of force or violence* means to wrongfully [and unlawfully] apply physical force to the property or person of another.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The defendant may admit to the fact that the incident occurred in a state prison or county jail. (Pen. Code, § 404.6(d).) If the defendant makes such an admission, the court should delete all bracketed references to state prison or county jail. If the defendant does not make such an admission, the court should give the bracketed portions referring to state prison or county jail.

AUTHORITY

- Elements. Pen. Code, § 404.6(c).
- Riot Defined. Pen. Code, § 404.
- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Force or Violence Defined. See *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612]; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Statute Constitutional. *People v. Davis* (1968) 68 Cal.2d 481, 484–487 [67 Cal.Rptr. 547, 439 P.2d 651].
- Terms of Statute Understandable. *People v. Jones* (1971) 19 Cal.App.3d 437, 447 [96 Cal.Rptr. 795].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 14.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.21 (Matthew Bender).

RELATED ISSUES

Defendant Must Urge Others

To be guilty of inciting a riot, the defendant must urge others to commit acts of force or property destruction. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [215 Cal.Rptr. 1, 700 P.2d 782]; *In re Wagner* (1981) 119

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Cal.App.3d 90, 106 [173 Cal.Rptr. 766].) Thus, in *In re Wagner, supra*, 119 Cal.App.3d at p. 106, the court held that the evidence was insufficient to establish incitement to riot where the defendant was observed throwing rocks at the police. *(Ibid.)*

(New January 2006)

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(iii) Possession of Contraband

2745. Possession or Manufacture of Weapon in Penal Institution

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The defendant is charged [in Count ____] with (possessing[,]/ [or] manufacturing[,]/ [or] attempting to manufacture) a weapon, specifically [(a/an)] _____ <*insert type of weapon from Pen. Code, § 4502, e.g., "explosive"*>, while (in a penal institution/ being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was (present at or confined in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution);**
2. **The defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) [(a/an)] _____ <*insert type of weapon from Pen. Code, § 4502, e.g., "explosive"*>;**
3. **The defendant knew that (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the _____ <*insert type of weapon from Pen. Code, § 4502, e.g., "explosive"*>;**

AND

4. **The defendant knew that the object (was [(a/an)] _____ <*insert type of weapon from Pen. Code, § 4502, e.g., "explosive"*>/could be used _____ <*insert description of weapon's use, e.g., "as a stabbing weapon," or "for purposes of offense or defense"*>).**

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] county jail[,]/ [or] county road camp).

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[*Metal knuckles* means any device or instrument made wholly or partially of metal that is worn in or on the hand for purposes of offense or defense and that either protects the wearer's hand while striking a blow or increases the injury or force of impact from the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs that would contact the individual receiving a blow.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **(is/are) [an] *explosive[s]*.]**

[*Fixed ammunition* is a projectile and powder enclosed together in a case ready for loading.]

[A *dirk or dagger* is a knife or other instrument, with or without a handguard, that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun,

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billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[[(A/An)] _____ <*insert type of weapon from Pen. Code, § 4502, not covered in above definitions*> **(is/means/includes)** _____ <*insert appropriate definition, see Bench Notes*>**.]**

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ <*insert type of weapon from Pen. Code, § 4502*>**, as defined here.]**

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the following weapons: _____ <*insert description of each weapon when multiple items alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) at least one of these weapons and you all agree on which weapon (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture).]**

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented:

metal knuckles

explosive substance

fixed ammunition

dirk or dagger

sharp instrument

pistol, revolver, or other firearm

tear gas or tear gas weapon

an instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag

Following the elements, give the appropriate definition of the alleged weapon. If the prosecution alleges that the defendant possessed an "instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, [or] sandbag," the court should give an appropriate definition based on case law. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496] [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons].) If the prosecution alleges that the defendant possessed a "sharp instrument," the court may consider *People v. Custodio* (1999) 73 Cal.App.4th 807, 810–813 [87 Cal.Rptr.2d 18]. If the court has already given the definition in other instructions, then the court may give the bracketed sentence stating that the term is defined elsewhere.

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

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If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If the prosecution alleges that the defendant attempted to manufacture a weapon, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

AUTHORITY

- Elements. Pen. Code, § 4502.
- Metal Knuckles Defined. Pen. Code, § 12020(c)(7).
- Explosive Defined. Health & Saf. Code, § 12000.
- Fixed Ammunition. *The Department of Defense Dictionary of Military Terms*, www.dtic.mil/doctrine/jel/doddict/ (accessed August 16, 2006).
- Dirk or Dagger Defined. Pen. Code, § 12020(c)(24).
- Firearm Defined. Pen. Code, § 12001(b).
- Tear Gas Defined. Pen. Code, § 12401.

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- Tear Gas Weapon Defined. Pen. Code, § 12402.
- Blackjack, etc., Defined. *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Sharp Instrument. *People v. Custodio* (1999) 73 Cal.App.4th 807, 810–813 [87 Cal.Rptr.2d 18].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735]; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Harmless Use. *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 182, 184.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the

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proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763] [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

Possession of Multiple Weapons at One Time Supports Only One Conviction

"[D]efendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison." (*People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].)

(New January 2006)

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2746. Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp

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The defendant is charged [in Count ____] with possessing a weapon while confined in a (jail/county road camp).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was lawfully confined in a (jail/county road camp);**
2. **While confined there, the defendant [unlawfully] possessed [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) within the (jail/ county road camp);**
3. **The defendant knew that (he/she) possessed the (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon);**

AND

4. **The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).**

[A *jail* is a place of confinement where people are held in lawful custody.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument, or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly

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combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> (is/are) [an] *explosive[s]*.]

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding whether the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person knowingly has (control over it/ [or] the right to control it), either personally or through another person).]

[The People allege that the defendant possessed the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the

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defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]

<Defense: Possession Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the weapon by (law[,]/ [or] a person in charge of the (jail/county road camp)[,]/ [or] an officer of the (jail/county road camp) empowered by the person in charge of the (jail/camp) to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the weapon. If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Note that the definition of "deadly weapon" in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to possess the weapon, give the bracketed word "unlawfully" in element 2. Give also the bracketed paragraph headed "Defense: Possession Authorized."

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown*

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(2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

AUTHORITY

- Elements. Pen. Code, § 4574(a).
- Firearm Defined. Pen. Code, § 12001(b).
- Explosive Defined. Health & Saf. Code, § 12000.
- Tear Gas Defined. Pen. Code, § 12401.
- Tear Gas Weapon Defined. Pen. Code, § 12402.
- Deadly Weapon Defined. *People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Harmless Use. *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].

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- Firearm Need Not Be Operable. *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 182, 184.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763]; [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

(New January 2006)

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2747. Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution

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The defendant is charged [in Count ____] with (bringing/sending/ [or] assisting in (bringing/sending)) a weapon into a penal institution.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or]explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];**
2. **The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) an object into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];**

AND

3. **The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).**

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

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[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type[s] of explosive[s] from Health & Saf. Code, § 12000*> **(is/are) [an] *explosive[s].*]**

[*Tear gas* means a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.] [A *tear gas weapon* means any shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following weapons: _____ <*insert description of each weapon when multiple items alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (brought/sent/ [or] assisted in (bringing/sending)) at least one of these weapons and you all agree on which weapon (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]**

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<Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) a weapon into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the weapon into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant brought or sent multiple weapons into the institution, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending))," inserting the items alleged.

If the defendant is charged with a felony for bringing or sending tear gas or a tear gas weapon into a penal institution resulting in the release of tear gas (Pen. Code, § 4574(b)), the court has a **sua sponte** duty to instruct the jury on this additional allegation. The court should give the jury an additional instruction on this issue and a verdict form on which the jury may indicate if this fact has or has not been proved.

Note that the definition of "deadly weapon" in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

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If there is sufficient evidence that the defendant was authorized to bring or send the weapon, give the bracketed word "unlawfully" in element 1. Give also the bracketed paragraph headed "Defense: Conduct Authorized."

AUTHORITY

- Elements. Pen. Code, § 4574(a), (b) & (c).
- Firearm Defined. Pen. Code, § 12001(b).
- Explosive Defined. Health & Saf. Code, § 12000.
- Tear Gas Defined. Pen. Code, § 12401.
- Tear Gas Weapon Defined. Pen. Code, § 12402.
- Deadly Weapon Defined. *People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Nature of Object. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Knowledge of Location as Penal Institution. *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- Harmless Use. *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Firearm Need Not Be Operable. *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- "Adjacent to" and "Grounds" Not Vague. *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 100.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Attempt to Bring or Send Weapon Into Penal Institution. Pen. Code, §§ 664, 4574(a), (b), or (c); *People v. Carter* (1981) 117 Cal.App.3d 546, 548 [172 Cal.Rptr. 838].

If the defendant is charged with bringing or sending tear gas or a tear gas weapon into a penal institution, the offense is a misdemeanor unless tear gas was released in the institution. (Pen. Code, § 4574(b) & (c).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that tear gas was released. If the jury finds that this has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].)

(New January 2006)

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2748. Possession of Controlled Substance or Paraphernalia in Penal Institution

The defendant is charged [in Count ____] with possessing (_____ <*insert type of controlled substance*>, a controlled substance/an object intended for use to inject or consume controlled substances), in a penal institution.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed (a controlled substance/an object intended for use to inject or consume controlled substances) in a penal institution [or on the grounds of a penal institution];**
2. **The defendant knew of the (substance's/object's) presence;**

[AND]

3. **The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming controlled substances)(;/.)**

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

[4. The controlled substance that the defendant possessed was _____ <*insert type of controlled substance*>;

AND

5. **The controlled substance was a usable amount.]**

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] (county/ [or] city) jail[,]/ [or] county road camp[,]/ [or] county farm[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees/ [or] place where prisoners or inmates are being held under the custody of a (sheriff[,]/ [or] chief of police[,]/ [or] peace officer[,]/ [or] probation officer).

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does

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not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[An object is *intended to be used* for injecting or consuming controlled substances if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

[The People allege that the defendant possessed the following items: _____ <*insert description of each controlled substance or all paraphernalia when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]

<A. Defense: Prescription>

[The defendant is not guilty of unlawfully possessing _____ <*insert type of controlled substance*> if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

<B. Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the (substance/item) by (the rules of the

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(Department of Corrections/prison/jail/institution/camp/farm/place)/ [or] the specific authorization of the (warden[,]/ [or] superintendent[,]/ [or] jailer[,]/ [or] [other] person in charge of the (prison/jail/institution/camp/farm/place)). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the (substance/item). If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with possessing a controlled substance, give elements 1 through 5. If the defendant is charged with possession of paraphernalia, give elements 1 through 3 only.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Give the bracketed sentence defining "intended to be used" if there is an issue over whether the object allegedly possessed by the defendant was drug paraphernalia. (See *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561].)

The prescription defense is codified in Health & Safety Code sections 11350 and 11377. This defense does apply to a charge of possession of a controlled substance in a penal institution. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].) The defendant need only raise a reasonable doubt about whether his possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence of a prescription, give the bracketed "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Prescription."

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If there is sufficient evidence that the defendant was authorized to possess the substance or item, give the bracketed word "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Conduct Authorized." (*People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].)

AUTHORITY

- Elements. Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948 [173 Cal.Rptr. 688].
- Knowledge. *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–947 [173 Cal.Rptr. 688].
- Usable Amount. *People v. Carrasco* (1981) 118 Cal.App.3d 936, 948 [173 Cal.Rptr. 688].
- Prescription Defense. Health & Saf. Code, §§ 11350, 11377.
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- Prescription Defense Applies. *People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].
- Authorization Is Affirmative Defense. *People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution. *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- "Adjacent to" and "Grounds" Not Vague. *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 124.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01 (Matthew Bender).

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment under Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].) However, the inmate is "held under custody by peace officers within the facility." (*Id.* at p. 1003.) Thus, Penal Code section 4573.6 does apply. *(Ibid.)*

Use of Controlled Substance Insufficient to Prove Possession

" '[*P*]*ossession*,' as used in that section, does not mean 'use' and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its '*possession*.' " (*People v. Spann* (1986) 187 Cal.App.3d 400, 408 [232 Cal.Rptr. 31] [italics in original]; see also *People v. Carrasco* (1981) 118 Cal.App.3d 936, 947 [173 Cal.Rptr. 688].)

Posting of Prohibition

Penal Code section 4573.6 requires that its "prohibitions and sanctions" be posted on the grounds of the penal institution. (Pen. Code, § 4573.6.) However, that requirement is not an element of the offense, and the prosecution is not required to prove compliance. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 246 [61 Cal.Rptr.2d 583].)

Possession of Multiple Items at One Time

"[C]ontemporaneous possession in a state prison of two or more discrete controlled substances . . . at the same location constitutes but one offense

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under Penal Code section 4573.6." (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067 [69 Cal.Rptr.2d 563].)

Administrative Punishment Does Not Bar Criminal Action

"The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings . . . ." (*Taylor v. Hamlet* (N.D.Cal., Oct. 29, 2003, No. C 01-4331 MMC (PR)) 2003 U.S.Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [345 P.2d 354] [Pen. Code, § 654 not implicated].)

Medical Use of Marijuana

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a defendant charged with violating Health and Safety Code section 4573.6. (*Taylor v. Hamlet* (N.D.Cal., Oct. 29, 2003, No. C 01-4331 MMC (PR)) 2003 U.S.Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. *(Ibid.)*

(New January 2006)

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(iv) Escape

2760. Escape

The defendant is charged [in Count ____] with (escape/ [or] attempting to escape).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a prisoner who had been ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/committed by order of the juvenile court to an adult facility);**

<*Alternative 2A—confined in penal institution*>

[2. The defendant was confined in (a/an) (county jail/city jail/ prison/ industrial farm/industrial road camp);]

<*Alternative 2B—engaged in county work*>

[2. The defendant was working on (a county road/ [or other] county work) as an inmate;]

<*Alternative 2C—lawful custody*>

[2. The defendant was in the lawful custody of (an officer/ [or] a person);]

<*Alternative 2D—work furlough*>

[2. The defendant was confined in (a/an) (county jail/city jail/ prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]

<*Alternative 2E—temporary release*>

[2. The defendant was confined in (a/an) (county jail/city jail/ prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]

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<Alternative 2F—home detention>

[2. The defendant was a participant in a home detention program;]

<Alternative 2G—confined under Pen. Code, § 4011.9>

[2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]

AND

<Alternative 3A—confined in penal institution>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp).]

<Alternative 3B—engaged in county work>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/ her)) while engaged in work at, or going to or returning from, the county work site.]

<Alternative 3C—lawful custody>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant.]

<Alternative 3D—work furlough>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement.]

<Alternative 3E—temporary release>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement.]

<Alternative 3F—home detention>

[3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program.]

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<Alternative 3G—confined under Pen. Code, § 4011.9>

[3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement.]

[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person's fingerprints and photograph.]

[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]

***Escape* means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a fence or a wall, intended to keep the prisoner within a designated area.]**

[A prisoner also *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]

[A prisoner is in the *lawful custody* of (an officer/ [or] a person) if the (officer/ [or] person), acting under legal authority, physically restrains or confines the prisoner so that the prisoner is significantly deprived of his or her freedom of movement or the prisoner reasonably believes that he or she is significantly deprived of his or her freedom of movement.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from.

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In the definition of escape, give the two bracketed sentences if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].)

Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

Give the bracketed paragraph defining lawful custody if there is an issue as to whether the defendant was in lawful custody. (*People v. Nicholson* (2004) 123 Cal.App.4th 823 [20 Cal.Rptr.3d 476].)

If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

If the prosecution alleges escape with force or violence (Pen. Code, § 4532(a)(2) or (b)(2)), give CALCRIM No. 2761, *Escape By Force or Violence*. (*People v. Gallegos, supra,* 39 Cal.App.3d at pp. 518–519.)

Defenses—Instructional Duty

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Elements. Pen. Code, § 4532(a)(1) & (b)(1).
- Specific Intent Not an Element of Completed Escape. *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].
- Attempt to Escape—Must Instruct on Direct Act and Specific Intent. *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined. *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].
- Arrested Defendant Must Be Booked Before Statute Applies. *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952]; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971 [76 Cal.Rptr.2d 898].
- Arrest of Probationer—Booking Not Required. *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123 [224 Cal.Rptr. 452].

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- Arrest of Parolee—Booking Not Required. *People v. Nicholson* (2004) 123 Cal.App.4th 823, 830 [20 Cal.Rptr.3d 476].
- Must Be Confined in Adult Penal Institution. *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668 [40 Cal.Rptr.2d 49].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 82–97.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.20[2] (Matthew Bender).

RELATED ISSUES

Violating Work Furlough Conditions

In order for an inmate assigned to work furlough to violate Penal Code section 4532, the inmate must "willfully" fail to return on time. (*Yost v. Superior Court* (1975) 52 Cal.App.3d 289, 292 [125 Cal.Rptr. 74] [defendant who was arrested on other charges on his way back to camp did not willfully fail to return].) If the defendant merely violates conditions of the work furlough release, that conduct falls under Penal Code section 1208, not section 4532. (*Id.* at p. 295.)

Defendant Illegally Detained

If a person is detained in custody "without any process, . . . wholly without authority of law," or "where the judgment was void on its face," the detention is illegal and the defendant may "depart" without committing the crime of escape. (*People v. Teung* (1891) 92 Cal. 421, 421–422, 426 [28 P. 577]; *In re Estrada* (1965) 63 Cal.2d 740, 749 [48 Cal.Rptr. 172, 408 P.2d 948].) "But where the imprisonment is made under authority of law and the process is simply irregular in form, or the statute under which he is confined is unconstitutional, the escape is unlawful." (*In re Estrada, supra,* 63 Cal.2d at p. 749.) Note that this is a narrow exception, one that

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has not been applied by the courts since the case of *People v. Clark* (1924) 69 Cal.App. 520, 523 [231 P. 590].

(New January 2006)

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2761. Escape by Force or Violence

The defendant is charged [in Count ____] with (escape/ [or] attempted escape) committed by force or violence.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/ committed by order of the juvenile court to an adult facility);**

<*Alternative 2A—confined in penal institution*>

[2. The defendant was confined in (a/an) (county jail/city jail/ prison/ industrial farm/industrial road camp);]

<*Alternative 2B—engaged in county work*>

[2. The defendant was working on (a county road/ [or other] county work) as an inmate;]

<*Alternative 2C—lawful custody*>

[2. The defendant was in the lawful custody of (an officer/ [or] a person);]

<*Alternative 2D—work furlough*>

[2. The defendant was confined in (a/an) (county jail/city jail/ prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]

<*Alternative 2E—temporary release*>

[2. The defendant was confined in (a/an) (county jail/city jail/ prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]

<*Alternative 2F—home detention*>

[2. The defendant was a participant in a home detention program;]

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<Alternative 2G—confined under Pen. Code, § 4011.9>

[2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]

<Alternative 3A—confined in penal institution>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp);]

<Alternative 3B—engaged in county work>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/ her)) while engaged in or going to or returning from the county work site;]

<Alternative 3C—lawful custody>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant;]

<Alternative 3D—work furlough>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement;]

<Alternative 3E—temporary release>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement;]

<Alternative 3F—home detention>

[3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program;]

<Alternative 3G—confined under Pen. Code, § 4011.9>

[3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement;]

AND

4. The defendant committed the (escape/ [or] attempted escape) by force or violence.

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[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person's fingerprints and photograph.]

[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]

***Escape* means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a fence or a wall, intended to keep the prisoner within a designated area.]**

[A prisoner also *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]

To commit an act *by force or violence* means to wrongfully use physical force against the property or person of another. [To *use force* against a person means to touch the other person in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The People must prove that the defendant personally used force or violence or aided and abetted another in using force or violence. Mere knowledge that someone else used force or violence is not enough. Instruction[s] ____ <*insert instruction numbers; see Bench Notes*> explain[s] when a person aids and abets another.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from and use the appropriate alternative paragraphs.

In the definition of escape, give the two bracketed sentences if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].)

Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

In the definition of force or violence, use the bracketed sentences if the prosecution alleges that the defendant used force against a person. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612] [meaning of "force" in Pen. Code, § 4532 equivalent to simple battery].)

Give the bracketed paragraph that begins with "The People must prove that the defendant personally" if this is an issue in the case. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].) Give also CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

Defenses—Instructional Duty

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Elements. Pen. Code, § 4532(a)(2) & (b)(2).
- Specific Intent Not an Element of Completed Escape. *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].

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- Attempt to Escape—Must Instruct on Direct Act and Specific Intent. *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined. *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].
- Force or Violence Defined. *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612]; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Force Includes Damage to Property. *People v. White* (1988) 202 Cal.App.3d 862, 866 [249 Cal.Rptr. 165]; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Defendant Must Personally Use Force or Aid and Abet Another. *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].
- Arrested Defendant Must Be Booked Before Statute Applies. *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952]; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971 [76 Cal.Rptr.2d 898].
- Arrest of Probationer—Booking Not Required. *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123 [224 Cal.Rptr. 452].
- Must Be Confined in Adult Penal Institution. *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668 [40 Cal.Rptr.2d 49].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 82–97.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.20[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

Escape carries a more severe penalty if done with force or violence. (Pen. Code, § 4532(a)(2) & (b)(2).) If the defendant is charged with using force

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or violence, then the escape without force or violence is a lesser included offense. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519 [114 Cal.Rptr. 166].) Note that the court must instruct on all the elements of escape with force or violence and must then give a separate instruction on the lesser offense, stating all of the elements except force or violence. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 633 [237 Cal.Rptr. 612].) The court may not give the jury a verdict form asking specifically if the element of force or violence has been proved. *(Ibid.)*

RELATED ISSUES

See Related Issues section in CALCRIM No. 2760, *Escape*.

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2762. Escape After Remand or Arrest

The defendant is charged [in Count ____] with (escape/ [or] attempted escape) following (a remand/an arrest).

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—remanded>

[1. The defendant was remanded, which means that a (magistrate/judge) ordered (him/her) placed into the custody of a (sheriff[,]/ [or] marshal[,]/ [or other] (police agency/peace officer));]

<Alternative 1B—arrested>

[1. The defendant was lawfully arrested by a peace officer and the defendant knew, or reasonably should have known, that (he/she) had been arrested;]

AND

2. The defendant (escaped/ [or] attempted to escape) from the custody of the (sheriff[,]/ marshal[,]/ [or other] (police agency/peace officer)).

***Escape* means the unlawful departure from the physical limits of custody.**

[A sworn member of _____ *<insert name of agency that employs peace officer>*, **authorized by** _____ *<insert appropriate section from Pen. Code, § 830 et seq.>* **to** _____ *<describe statutory authority>*, **is a *peace officer*.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony for use of force or violence, give CALCRIM No. 2763, *Escape After Remand or Arrest: Force or Violence* with this instruction.

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If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

If lawfulness of the arrest is an issue, give the appropriate paragraphs from CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

The jury must determine whether the person who arrested the defendant is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 640, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the person was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

Defenses—Instructional Duty

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Elements. Pen. Code, § 836.6
- Specific Intent Not an Element of Completed Escape. *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].
- Attempt to Escape—Must Instruct on Direct Act and Specific Intent. *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined. *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 97.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05 (Matthew Bender).

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LESSER INCLUDED OFFENSES

Escape after remand or arrest is a misdemeanor unless the defendant used force or violence and caused serious bodily injury to a peace officer. (Pen. Code, § 836.6(c).) If the defendant is charged with the felony, then the misdemeanor is a lesser included offense. (See People v. Gallegos (1974) 39 Cal.App.3d 512, 518–519 [114 Cal.Rptr. 166].) The court must provide the jury with a verdict form on which the jury will indicate if the additional elements have or have not been proved. If the jury finds that these elements have not been proved, then the offense should be set at a misdemeanor.

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2763. Escape After Remand or Arrest: Force or Violence

If you find the defendant guilty of (escape/ [or] attempted escape) following (remand/arrest), you must then decide whether the People have proved the additional allegation that the defendant used force or violence and caused serious bodily injury to a peace officer.

To prove this allegation, the People must prove that:

1. **The defendant committed the (escape/ [or] attempted escape) by force or violence;**

AND

2. **The defendant caused serious bodily injury to a peace officer.**

As used here, *using force or violence* means the wrongful application of physical force against the person of another. To *use force* against a person means to touch the other person in a harmful or offensive manner.

[The People must prove that the defendant personally used force or violence or aided and abetted another in using force or violence. Mere knowledge that someone else used force or violence is not enough. Instruction[s] ____ <*insert instruction numbers; see Bench Notes*> explain[s] when a person aids and abets another.]

A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

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[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the injury.]

A sworn member of _____ <*insert name of agency that employs peace officer*>**, authorized by** _____ <*insert appropriate section from Pen. Code, § 830 et seq.*> **to** _____ <*describe statutory authority*>**, is a *peace officer*.**

The People have the burden of proving beyond a reasonable doubt that the defendant used force or violence and caused serious bodily injury to a peace officer. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor.

This instruction **must** be given with CALCRIM No. 2762, *Escape After Remand or Arrest*. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the additional allegation of the use of force.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed paragraph that begins with "The People must prove that the defendant personally" if this is an issue in the case. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].) Give also

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CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

The jury must determine whether the person who arrested the defendant is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the person was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

AUTHORITY

- Elements. Pen. Code, § 836.6.
- Force or Violence Defined. *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612]; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Defendant Must Personally Use Force or Aid and Abet Another. *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].
- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 97.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

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2764. Escape: Necessity Defense

If you conclude that the defendant (escaped/ [or] attempted to escape), that conduct was not illegal if the defendant can prove the defense of necessity. In order to establish this defense, the defendant must prove that:

1. **The defendant was faced with a specific threat of (death[,]/ [or] forcible sexual attack[,]/ [or] substantial bodily injury) in the immediate future;**
2. **(There was no time for the defendant to make a complaint to the authorities/ [or] (There/there) was a history of complaints that were not acted on, so that a reasonable person would conclude that any additional complaints would be ineffective);**
3. **There was no time or opportunity to seek help from the courts;**
4. **The defendant did not use force or violence against prison personnel or other people in the escape [other than the person who was the source of the threatened harm to the defendant];**

AND

5. **The defendant immediately reported to the proper authorities when (he/she) had attained a position of safety from the immediate threat.**

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof from proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the five listed items is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the defense of necessity if there is sufficient evidence to raise

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a reasonable doubt. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Escape—Necessity Defense. *People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 53.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.20[2] (Matthew Bender).

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TAX CRIMES

A. FAILURE TO FILE

2800. Failure to File Tax Return

2801. Willful Failure to File Tax Return

2802–2809. Reserved for Future Use

B. FALSE RETURN

2810. False Tax Return

2811. Willfully Filing False Tax Return: Statement Made Under Penalty of Perjury

2812. Willfully Filing False Tax Return: Intent to Evade Tax

2813–2824. Reserved for Future Use

C. OTHER TAX OFFENSES

2825. Aiding in Preparation of False Tax Return

2826. Willful Failure to Pay Tax

2827. Concealing Property With Intent to Evade Tax

2828. Failure to Withhold Tax

2829–2839. Reserved for Future Use

D. EVIDENCE

2840. Evidence of Uncharged Tax Offense: Failed to File Previous Returns

2841. No Deductions on Gross Income From Illegal Conduct

2842. Determining Income: Net Worth Method

2843. Determining Income: Bank Deposits Method

2844. Determining Income: Cash Expenditures Method

2845. Determining Income: Specific Items Method

2846. Proof of Unreported Taxable Income: Must Still Prove Elements of Offense

2847–2859. Reserved for Future Use

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E. DEFENSES

2860. Defense: Good Faith Belief Conduct Legal
2861. Defense: Reliance on Professional Advice
2862–2899. Reserved for Future Use

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A. FAILURE TO FILE

2800. Failure to File Tax Return

The defendant is charged [in Count ____] with failing to (file a tax return with/ [or] supply information to) the Franchise Tax Board.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was required to (file a tax return with/ [or] supply information to) the Franchise Tax Board;**
2. **The defendant repeatedly failed to (file a tax return/ [or] supply required information) over a period of two years or more;**

AND

3. **The defendant's failure to (file the return/ [or] supply required information) resulted in an estimated delinquent tax liability of at least fifteen thousand dollars.**

[If the People prove beyond a reasonable doubt that the Franchise Tax Board issued a certificate stating that (a return had not been filed/ [or] information had not been supplied) as required by law, you may but are not required to conclude that (the return was not filed/ [or] the information was not supplied).]

[If the People prove beyond a reasonable doubt that the defendant was the (president/ [or] chief operating officer) of a corporation, you may but are not required to conclude that the defendant is the person responsible for (filing a return with/ [or] supplying information to) the Franchise Tax Board as required for that corporation.]

[The People do not have to prove the exact amount of unreported income.]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The two bracketed paragraphs that begin with "If the People prove beyond a reasonable doubt that" both explain rebuttable presumptions created by statute. (See Rev. & Tax. Code, §§ 19703, 19701(d); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that the Franchise Tax Board" if there is evidence that the return was filed or the information was supplied.

Similarly, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that the defendant was the (president" if there is evidence that someone else was responsible for filing the return or supplying the information.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19701(a).
- Certificate of Franchise Tax Board. Rev. & Tax. Code, § 19703.
- President Responsible for Corporate Filings. Rev. & Tax. Code, § 19701(d).
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Need Not Prove Exact Amount. *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct. 1233, 87 L.Ed. 1546].

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- Need Not Prove From Illegal Activity. *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

COMMENTARY

Revenue and Taxation Code section 19701(a) does not require that the defendant's conduct be "willful" and specifically states that the act may be "[w]ith or without intent to evade." (Rev. & Tax. Code, § 19701(a).) Courts have held that this language creates a strict liability offense with no intent requirement. (*People v. Allen* (1993) 20 Cal.App.4th 846, 849 [25 Cal.Rptr.2d 26]; *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698 [31 Cal.Rptr. 253]; *People v. Jones* (1983) 149 Cal.App.3d Supp. 41, 47 [197 Cal.Rptr. 273].) In addition, in *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563], the Court held that section 19701 was a lesser included offense of section 19705, willful failure to file a tax return. The Court then concluded that the failure to instruct on the lesser included offense was not error since the "the evidence provided no basis for reasonable doubt as to willfulness." (*Id.* at p. 672.) Thus, it appears that "willfulness" is not an element of a violation of section 19701(a).

Revenue and Taxation Code section 19701(a) states that a person is liable if the person

> repeatedly over a period of two years or more, fails to file any return or to supply any information required, or who . . . makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, resulting in an estimated delinquent tax liability of at least fifteen thousand dollars ($15,000).

It is not completely clear from this language whether the requirement of an estimated delinquent tax liability of at least fifteen thousand dollars applies both to the failure to file a return and to the making, etc. of a false or fraudulent return. The Legislative Counsel's Digest of Assembly Bill No. 139, the bill that added this provision to the statute, indicates that this provision is intended to apply to all the violations specified in Revenue

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and Taxation Code section 19701(a), including the failure to file a return or supply required information. (See Legis. Counsel's Dig., Assem. Bill No. 139 (2005–2006 Reg. Sess.) Stats. 2005, ch. 74, par. (34).) The committee has adopted this interpretation pending clarification from either the Legislature or case law.

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2801. Willful Failure to File Tax Return

The defendant is charged [in Count ____] with intentionally failing to (file a tax return with/ [or] supply information to) the Franchise Tax Board.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was required to (file a tax return with/ [or] supply information to) the Franchise Tax Board;**
2. **The defendant did not (file the tax return/ [or] supply the information) by the time required;**
3. **The defendant voluntarily chose not to (file the tax return/ [or] supply the information), with the intent to violate a legal duty known to (him/her);**

AND

4. **When the defendant made that choice, (he/she) intended to unlawfully evade paying a tax.**

[If the People prove beyond a reasonable doubt that the Franchise Tax Board issued a certificate stating that (a return had not been filed/ [or] information had not been supplied) as required by law, you may but are not required to conclude that (the return was not filed/ [or] the information was not supplied).]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/ [or] owed a substantial amount in [additional] taxes).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19706.) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19703; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that the return was filed or the information was supplied.

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "[It] is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912 [77 S.Ct. 661, 1 L.Ed.2d 665].) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions,

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Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19706.
- Willful Requires Volitional Violation of Known Legal Duty. *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.
- Evade a Tax Defined. See *United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8 [93 S.Ct. 2008, 36 L.Ed.2d 241]; *Distinctive Theatres of Columbus v. Looker* (S.D.Ohio 1958) 165 F.Supp. 410, 411.
- Certificate of Franchise Tax Board. Rev. & Tax. Code, § 19703.
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Need Not Prove Exact Amount. *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct 1233, 87 L.Ed. 1546].
- Need Not Prove From Illegal Activity. *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to File Tax Return. Rev. & Tax. Code, § 19701; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1182–1183 [203 Cal.Rptr. 196].

(New January 2006)

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B. FALSE RETURN

2810. False Tax Return

The defendant is charged [in Count ____] with (supplying (false/ [or] fraudulent) information to the Franchise Tax Board/ [or] (making[,]/ [or] verifying[,]/ [or] signing[,]/ [or] rendering) a (false/ [or] fraudulent) (tax return/ [or] statement)).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant repeatedly (supplied information to the Franchise Tax Board/ [or] (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered [a] tax return[s]/ [or] statement[s]) over a period of two years or more;**
2. **The (information[,]/ [or] tax return[,]/ [or] statement) was (false/ [or] fraudulent);**

<Alternative 3A—information>

[3. When the defendant supplied the information, (he/she) knew that it was (false/ [or] fraudulent);]

<Alternative 3B—tax return or statement>

[3. When the defendant (made[,]/ [or] verified[,]/ [or] signed [,]/ [or] rendered) the (tax return/ [or] statement), (he/she) knew that it contained (false/ [or] fraudulent) information;]

AND

4. **The defendant's (supplying of (false/ [or] fraudulent) information/ [or] (making[,]/ [or] verifying[,]/ [or] signing[,]/ [or] rendering) the (false/ [or] fraudulent) (tax return/ [or] statement)) resulted in an estimated delinquent tax liability of at least fifteen thousand dollars.**

[If the People prove beyond a reasonable doubt that the defendant was the (president/ [or] chief operating officer) of a corporation, you may but are not required to conclude that the defendant is the person responsible for (filing a return with / [or]

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supplying information to) the Franchise Tax Board as required for that corporation.]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19701(d); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (People v. Roder (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that someone else was responsible for filing the return or supplying the information.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19701(a).
- President Responsible for Corporate Filings. Rev. & Tax. Code, § 19701(d).
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

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- Need Not Prove Exact Amount. *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct. 1233, 87 L.Ed. 1546].
- Need Not Prove From Illegal Activity. *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02, 140.03 (Matthew Bender).

COMMENTARY

Revenue and Taxation Code section 19701(a) does not require that the defendant's conduct be "willful" and specifically states that the act may be "[w]ith or without intent to evade." (Rev. & Tax. Code, § 19701(a).) In the context of failure to file a tax return, courts have held that this language creates a strict liability offense with no intent requirement. (*People v. Allen* (1993) 20 Cal.App.4th 846, 849 [25 Cal.Rptr.2d 26]; *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698 [31 Cal.Rptr. 253]; *People v. Jones* (1983) 149 Cal.App.3d Supp. 41, 47 [197 Cal.Rptr. 273.) In addition, in *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563], the Court held that section 19701 was a lesser included offense of section 19705, willful failure to file a tax return. (*Id.* at p. 670.) The Court then concluded that the failure to instruct on the lesser included offense was not error since "the evidence provided no basis for reasonable doubt as to willfulness." (*Id.* at p. 672.) Thus, it appears that "willfulness" is not an element of a violation of section 19701(a).

Revenue and Taxation Code section 19701(a) states that a person is liable if the person

> repeatedly over a period of two years or more, fails to file any return or to supply any information required, or who . . . makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, resulting in an estimated delinquent tax liability of at least fifteen thousand dollars ($15,000).

It is not completely clear from this language whether the requirement of an estimated delinquent tax liability of at least fifteen thousand dollars applies

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both to the failure to file a return and to the making, etc. of a false or fraudulent return. The Legislative Counsel's Digest of Assembly Bill No. 139, the bill that added this provision to the statute, indicates that this provision is intended to apply to all the violations specified in Revenue and Taxation Code section 19701(a), including the failure to file a return or supply required information. (See Legis. Counsel's Dig., Assem. Bill No. 139 (2005–2006 Reg. Sess.) Stats. 2005, ch. 74, par. (34).) The committee has adopted this interpretation pending clarification from either the Legislature or case law.

(Revised August 2006)

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2811. Willfully Filing False Tax Return: Statement Made Under Penalty of Perjury

The defendant is charged [in Count ____] with intentionally making and signing (a/an) (false/ [or] inaccurate) (tax return[,]/ [or] statement[,]/ [or other] document) provided to the Franchise Tax Board.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant made and signed a (tax return[,]/ [or] statement[,]/ [or other] document) provided to the Franchise Tax Board;**
2. **The (tax return[,]/ [or] statement[,]/ [or other] document) (contained/ [or] was verified by) a written declaration that it was made under penalty of perjury;**
3. **The (tax return[,]/ [or] statement[,]/ [or other] document) contained a material statement that was (false/ [or] inaccurate);**
4. **When the defendant made and signed the (tax return[,]/ [or] statement[,]/ [or other] document), (he/she) did not believe that the document was true and correct about every material matter;**

AND

5. **When the defendant acted, (he/she) did so voluntarily, with the intent to violate a legal duty known to (him/her).**

A (false/ [or] inaccurate) statement is *material* if a reasonable person would believe that it could influence the calculation or monitoring of the amount of tax owed. [Although the People must prove that the statement was material, the People do not have to prove that any additional tax was owed to the government.]

[If the People prove beyond a reasonable doubt that the defendant's name is signed to a (return[,]/ [or] statement[,]/ [or other] document) filed with the Franchise Tax Board, you may but are not required to conclude that the defendant was the person who actually signed the document. [A document can be

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filed using (a/an) (computer modem[,]/ [or] magnetic media[,]/ [or] optical disk[,]/ [or] facsimile machine[,]/ [or] telephone).]]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Two statutes prohibit willfully making a false return. (Rev. & Tax. Code, §§ 19705(a)(1), 19706.) Section 19705(a)(1) requires verification under penalty of perjury whereas section 19706 requires an intent to evade. (*People v. Hagen* (1998) 19 Cal.4th 652, 659 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give this instruction if the defendant is charged with a violation of section 19705(a)(1). If the defendant is charged with a violation of section 19706, give CALCRIM No. 2812, *Willfully Filing False Tax Return: Intent to Evade Tax*.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19705(a)(1).) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

In the definition of "material," give the bracketed sentence beginning with "Although the People must prove that the statement was material" if requested. (*United States v. Ballard* (8th Cir. 1976) 535 F.2d 400, 404; Federal Jury Practice and Instructions, Criminal (5th ed.) §§ 67.15, 67.19.)

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19075(c); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional

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mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that the defendant did not sign the document.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19705(a)(1); see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.15.
- Willful Requires Volitional Violation of Known Legal Duty. *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.
- False or Inaccurate Statement Required. *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563].
- Material Defined. *People v. Hagen* (1998) 19 Cal.4th 652, 667–668 [80 Cal.Rptr.2d 24, 967 P.2d 563].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

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- Need Not Prove Exact Amount. *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct. 1233, 87 L.Ed. 1546].
- Need Not Prove From Illegal Activity. *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].
- Electronic Technology Defined. Rev. & Tax. Code, § 18621.5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Filing False Tax Return. Rev. & Tax. Code, § 19701; *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563].

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2812. Willfully Filing False Tax Return: Intent to Evade Tax

The defendant is charged [in Count ____] with (supplying (false/ [or] fraudulent) information/ [or] (making[,]/ [or] verifying [,]/ [or] signing[,]/ [or] rendering) [a] (false/ [or] fraudulent) (tax return[s]/ [or] statement[s])) to the Franchise Tax Board with intent to evade a tax.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (supplied information/ [or] (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered)) [a] (tax return[s]/ [or] statement[s] provided) to the Franchise Tax Board;**
2. **The (information[,]/ [or] tax return[,]/ [or] statement) was (false/ [or] fraudulent);**

<Alternative 3A—information>

[3. When the defendant supplied the information, (he/she) knew that it was (false/ [or] fraudulent);]

<Alternative 3B—tax return or statement>

[3. When the defendant (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) the (tax return/ [or] statement), (he/she) knew that it contained (false/ [or] fraudulent) information;]

4. **When the defendant acted, (he/she) did so voluntarily, with intent to violate a legal duty known to (him/her);**

AND

5. **When the defendant acted, (he/she) intended to unlawfully evade paying a tax.**

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/ [or] owed a substantial amount in [additional] taxes).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Two statutes prohibit willfully making a false return. (Rev. & Tax. Code, §§ 19705(a)(1), 19706.) Section 19705(a)(1) requires verification under penalty of perjury whereas section 19706 requires an intent to evade. (*People v. Hagen* (1998) 19 Cal.4th 652, 659 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give this instruction if the defendant is charged with a violation of section 19706. If the defendant is charged with a violation of section 19705(a)(1), give CALCRIM No. 2811, *Willfully Filing False Tax Return: Statement Made Under Penalty of Perjury*.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19706.) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "[It] is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912 [77 S.Ct. 661, 1 L.Ed.2d 665].) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

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Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19706.
- Evade a Tax Defined. See *United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8 [93 S.Ct. 2008, 36 L.Ed.2d 941]; *Distinctive Theatres of Columbus v. Looker* (S.D.Ohio 1958) 165 F.Supp. 410, 411.
- Willful Requires Volitional Violation of Known Legal Duty. *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.
- Need Not Prove Exact Amount. *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct. 1233, 87 L.Ed. 1546].
- Need Not Prove From Illegal Activity. *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158 [203 Cal.Rptr. 196].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02 (Matthew Bender).

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LESSER INCLUDED OFFENSES

- Filing False Tax Return. Rev. & Tax. Code, § 19701; *People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24, 967 P.2d 563].

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C. OTHER TAX OFFENSES

2825. Aiding in Preparation of False Tax Return

The defendant is charged [in Count ____] with (aiding in[,]/ [or] assisting in[,]/ [or] procuring[,]/ [or] counseling[,]/ [or] advising) the (preparation/ [or] presentation) of a (false/ [or] fraudulent) (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (aided in[,]/ assisted in[,]/ [or] procured[,]/ [or] counseled[,]/ [or] advised) the (preparation/ [or] presentation) of a (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) required under the (personal income/corporation) tax laws;**
2. **The (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) contained a material statement that was (false/ [or] fraudulent);**

<See Bench Notes on element 3.>

[3. The defendant knew that the (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) contained a (false/ [or] fraudulent) statement;]

AND

(3/4). When the defendant acted, (he/she) did so voluntarily, with intent that a known legal duty would be violated.

A (false/ [or] fraudulent) statement is *material* if a reasonable person would believe that it could influence the calculation or monitoring of the amount of tax owed. [Although the People must prove that the statement was material, the People do not have to prove that any additional tax was owed to the government.]

The People do not need to prove that the taxpayer, as opposed to the defendant, knew the (tax return[,]/ [or] affidavit[,]/ [or]

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claim[,]/ [or other] document) contained a (false/ [or] fraudulent) statement.

Someone *aids* in the (preparation/ [or] presentation) of a (false/ [or] fraudulent) (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) if, before or during the (preparation/ [or] presentation) of the document, he or she does something that encourages another person to (prepare/ [or] present) the (false/ [or] fraudulent) document. [The defendant does not need to personally prepare the document or even be present when the document is completed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19705(a)(2).) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Element 3 contains a knowledge requirement. The statute does not specifically require that the defendant knew that the return contained false information. (Rev. & Tax. Code, § 19705(a)(2).) However, federal pattern jury instructions for the analogous federal crime (26 U.S.C., § 7206(2)) require that the defendant must have known that the document was false even though the federal statute also does not explicitly contain a knowledge requirement. (Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 95 (2003); Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 2.97 (2001); but see Pattern Jury Instructions of the Committee on Model Jury Instructions for the Ninth Circuit, Criminal Cases, Instruction No. 9.38 (2003) [knowledge not specifically required, defendant must assist in preparing "false" return].) Element 3 is included for the court to give at its discretion. The committee

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recommends that the court review current federal case law, as advised in *People v. Hagen* (1998) 19 Cal.4th 652 [80 Cal.Rptr.2d 24, 967 P.2d 563].

In the definition of "material," give the bracketed sentence beginning with "Although the People must prove that the statement was material" if requested. (*Edwards v. United States* (9th Cir. 1967) 375 F.2d 862, 865, overruled on other grounds in *United States v. Bishop* (1973) 412 U.S. 346, 351, fn. 3 [93 S.Ct. 2008, 36 L.Ed.2d 941]; see also *United States v. Ballard* (8th Cir. 1976) 535 F.2d 400, 404; Federal Jury Practice and Instructions, Criminal (5th ed.) §§ 67.15, 67.19.)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19705(a)(2).
- Willful Requires Volitional Violation of Known Legal Duty. *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].
- Material Defined. *People v. Hagen* (1998) 19 Cal.4th 652, 667–668 [80 Cal.Rptr.2d 24, 967 P.2d 563].
- Aiding and Abetting. *United States v. Graham* (3d Cir. 1985) 758 F.2d 879, 885; *United States v. Buttorff* (8th Cir. 1978) 572 F.2d 619, 623.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

RELATED ISSUES

Defendant Need Not Personally Prepare Document

Federal courts have held that the analogous federal statute applies to individuals who counsel and advise the preparation of fraudulent documents. (*United States v. Clark* (5th Cir. 1998) 139 F.3d 485, 489–490; *United States v. Bryan* (5th Cir. 1990) 896 F.2d 68, 74.) The defendant

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need not personally prepare the document or even be present when the document is completed. (*United States v. Clark, supra,* 139 F.3d at pp. 489–490; *United States v. Bryan, supra,* 896 F.2d at p. 74; see also *United States v. Buttorff* (8th Cir. 1978) 572 F.2d 619, 623 [sufficient evidence of aiding where defendants lectured about antitax views to large groups].)

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2826. Willful Failure to Pay Tax

The defendant is charged [in Count ____] with intentionally failing to pay a required (tax/estimated tax) to the Franchise Tax Board.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was required to pay a (tax/estimated tax) to the Franchise Tax Board;**
2. **The defendant failed to pay the (tax/estimated tax) by the date it was due;**

AND

3. **The defendant voluntarily chose not to pay, with intent to violate a legal duty known to (him/her).**

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/ [or] owed a substantial amount in [additional] taxes).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19701(c).) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir.

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1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "[It] is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19701(c).
- Willful Requires Volitional Violation of Known Legal Duty. *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

COMMENTARY

Revenue and Taxation Code section 19701(c) provides that a person who willfully fails to pay any estimated tax or tax that the person is required to pay is guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution. However, subdivision (c) also provides that the preceding sentence "shall not apply to any person who is mentally incompetent, or suffers from dementia, Alzheimer's disease, or similar condition." Rev. & Tax. Code, § 19701(c).

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2827. Concealing Property With Intent to Evade Tax

The defendant is charged [in Count ____] with (removing[,]/ [or] depositing[,]/ [or] concealing) property with intent to evade a tax.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (removed[,]/ [or] deposited[,]/ [or] concealed) (property[,]/ [or] goods[,]/ [or] commodities);**

<Alternative 2A—concealment of goods or commodities to avoid tax>

[2. A tax was (imposed on/ [or] legally authorized for) the (goods/ [or] commodities);]

<Alternative 2B—concealment of property to avoid levy>

[2. A levy was legally authorized against the property;]

AND

3. **When the defendant acted, (he/she) intended to unlawfully (evade/ [or] defeat) the (assessment/ [or] collection) of [a] (tax[,]/ additions to a tax[,]/ penalty[,]/ [or] interest) imposed under the tax laws.**

[To *levy property* means to seize, attach, or garnish the property as payment for a debt owed. A levy is *legally authorized* against property if:

1. **The Franchise Tax Board has assessed a tax against the defendant and sent the defendant a notice demanding payment;**
2. **The defendant has neglected or refused to pay;**

AND

3. **The defendant owns the property that is the subject of the levy.]**

[As used here, a person removes an item when he or she takes it from the place [where it was made and] where a tax was supposed to be assessed and paid on the item.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Revenue and Taxation Code section 19705(a)(4) applies to two situations: (1) when a person conceals or removes goods or commodities that are subject to taxation in order to prevent paying the tax owed on those goods; and (2) when a person who has failed to pay a tax owed conceals property that the government has the right to levy as payment for the tax.

In element 2, give alternative 2A if the defendant is charged with concealing goods or commodities to avoid a tax assessment. Give alternative 2B and the bracketed definition of "levy" if the defendant is charged with concealing property to avoid a levy. (*United States v. Swarthout* (6th Cir. 1970) 420 F.2d 831, 833–835.) Depending on the legal basis of the levy, the court may need to add additional items to the explanation of "legally authorized." (See Rev. & Tax. Code, § 19705(a)(4) and statutes cited therein on when a levy is legally authorized.)

Give the bracketed definition of "remove" if the defendant is charged with removing goods or commodities subject to taxation. (*Price v. United States* (5th Cir. 1945) 150 F.2d 283, 285.) Give the bracketed phrase "where it was made" if the defendant is charged with removing an item from the site of manufacture. *(Ibid.)*

Revenue and Taxation Code section 19705(a)(4) also penalizes anyone "concerned in removing, depositing, or concealing" property. If the defendant is charged with "being concerned in" the conduct, the court should instruct on aiding and abetting. (See CALCRIM No. 400, *Aiding and Abetting: General Principles,* et seq.)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to

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give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements. Rev. & Tax. Code, § 19705(a)(4).
- Concealment to Avoid Levy: Tax Must Have Been Assessed. *United States v. Swarthout* (6th Cir. 1970) 420 F.2d 831, 833–835; *United States v. Inarik* (6th Cir. 1989) 875 F.2d 1186, 1195.
- Removal Defined. *Price v. United States* (5th Cir. 1945) 150 F.2d 283, 285.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02 (Matthew Bender).

RELATED ISSUES

Physical Concealment Not Required

A defendant may "conceal" property for the purposes of this statute by making a false record that he or she does not own the property. (*United States v. Bregman* (3d Cir. 1962) 306 F.2d 653, 654–655.)

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2828. Failure to Withhold Tax

The defendant is charged [in Count ____] with intentionally failing to (withhold/collect, or truthfully account for,) and pay (a/an) (tax/ [or] amount required to be withheld) to the Franchise Tax Board.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **Under state tax laws, the defendant was required to (withhold/collect, or truthfully account for,) and pay (a/an) (tax/ [or] amount required to be withheld) to the Franchise Tax Board;**
2. **The defendant did not do so;**

AND

3. **The defendant voluntarily chose not to do so, with intent to violate a legal duty known to (him/her).**

[The People do not have to prove the exact amount owed. The People must prove beyond a reasonable doubt that the amount the defendant failed to (withhold/collect, or truthfully account for,) and pay to the Franchise Tax Board was substantial.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a violation of Revenue and Taxation Code section 19709, give the option "withhold" in the introduction, element 1, and the last bracketed paragraph. If the defendant is charged with a violation of Revenue and Taxation Code section 19708, give the option "collect or truthfully account for." See Commentary below on the use of the term "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir.

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1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "[It] is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563].) Give CALCRIM No. 2860, *Defense: Good Faith Belief Conduct Legal*.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give CALCRIM No. 2861, *Defense: Reliance on Professional Advice*.

AUTHORITY

- Elements. Rev. & Tax. Code, §§ 19708, 19709.
- Violation of Section 19709 Must Be Willful. *People v. Singer* (1980) 115 Cal.App.3d Supp. 7, 10 [171 Cal.Rptr. 587].
- Willful Requires Volitional Violation of Known Legal Duty. *People v. Hagen* (1998) 19 Cal.4th 652, 666 [80 Cal.Rptr.2d 24, 967 P.2d 563]; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.

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- Need Not Prove Exact Amount. *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518 [63 S.Ct. 1233, 87 L.Ed. 1546].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 129.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

COMMENTARY

Element 3 contains the definition of "willful" violation of a tax law derived from *People v. Hagen* (1998) 19 Cal.4th 652, 659–660 [80 Cal.Rptr.2d 24, 967 P.2d 563], and *United States v. Bishop* (1973) 412 U.S. 346, 360–361 [93 S.Ct. 2008, 36 L.Ed.2d 941]. Revenue and Taxation Code section 19708 specifically requires that the defendant's act be willful, but section 19709 does not explicitly include the element of willfulness. In *People v. Singer* (1980) 115 Cal.App.3d Supp. 7, 10 [171 Cal.Rptr. 587], the court construed section 19709 as also requiring a willful violation. Although it is unclear, it appears that based on this ruling, the *Hagen-Bishop* definition of willful also applies to a violation of section 19709.

(New January 2006)

2829–2839. Reserved for Future Use

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D. EVIDENCE

2840. Evidence of Uncharged Tax Offense: Failed to File Previous Returns

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The People presented evidence that the defendant did not file [a] tax return[s] for [a] year[s] not charged in this case.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant did not file [a] tax return[s] for (that/those) year[s]. Proof by a preponderance of the evidence is a different standard of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden, you must disregard this evidence entirely.

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], you may, but are not required to, consider that evidence for the limited purpose of deciding whether:

<A. Intent>

[The defendant acted with the intent to _____ *<insert specific intent required to prove the offense alleged>* **in this case](./;)**

[OR]

<B. Accident or Mistake>

[The defendant's alleged actions were the result of mistake or accident.]

Do not consider this evidence for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***].**

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If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged offense*>. The People must still prove each element of _____ <*insert charged offense*> beyond a reasonable doubt.

[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced under Evidence Code section 1101(b). (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].)

Evidence of the failure of the defendant to file tax returns in previous years may be admitted as evidence of prior illegal acts tending to show intent or lack of accident or mistake. (*United States v. Fingado* (10th Cir. 1991) 934 F.2d 1163, 1165–1166.)

The court **must** identify for the jury what issue the evidence has been admitted for: to prove mental state, to prove lack of accident or mistake, or to prove both.

The paragraph that begins with "If you conclude that the defendant did not file" has been included to prevent jury confusion over the standard of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] [instruction on Evidence Code section 1108 evidence sufficient where it advised jury that prior offense alone not sufficient to convict; prosecution still required to prove all elements beyond a reasonable doubt].)

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offenses to Prove Identity, Intent, or Common Plan, etc.*

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AUTHORITY

- Evidence of Prior Uncharged Acts. Evid. Code, § 1101(b).
- Standard of Proof Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Previous Failure to File Tax Returns. *United States v. Fingado* (1991) 934 F.2d 1163, 1165–1166.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

RELATED ISSUES

See Bench Notes and Related Issues section in CALCRIM No. 375, *Evidence of Uncharged Offenses of Prove Identity, Intent, or Common Plan, etc*.

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2841. No Deductions on Gross Income From Illegal Conduct

When computing taxable income, no deductions are allowed on gross income derived directly from illegal activities, including _____ <*insert activity from Rev. & Tax. Code, § 17282(a)*>.

In addition, no deductions are allowed on gross income that is derived from any other activities directly connected or associated with illegal activities, or that directly tend to promote or to further illegal activities.

[Prohibited deductions include deductions for cost of goods sold.]

BENCH NOTES

Instructional Duty

Give this instruction if requested and relevant based on the evidence.

Where indicated, insert the specific offense from Revenue and Taxation Code section 17282(a) that was allegedly the source of the income.

AUTHORITY

- Statute. Rev. & Tax. Code, § 17282(a).

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2842. Determining Income: Net Worth Method

In this case, the People are using what is called the *net worth method* to try to prove that the defendant had unreported taxable income. I will now explain the net worth method.

On any given date, a person's *net worth* is the value of everything that person owns minus the value of all that person's debts and financial obligations. It is the difference between what a person owns and what that person owes. The value of any item that a person owns is measured by what it was worth when it was acquired, not its current market value.

If the People prove that the defendant's net worth increased during _____ <*insert year alleged*>, then you may but are not required to conclude that the defendant received money or property during that year.

In order to prove that the money or property received was taxable income, the People must also prove that: (1) the defendant had one or more sources of taxable income, and (2) the money or property the defendant received during the year did not come from nontaxable sources. Nontaxable sources of income include gifts, inheritances, loans, or redeposits or transfers of funds between bank accounts.

If the People have proved that: (a) the defendant's net worth increased during _____ <*insert year alleged*>, (b) the defendant had one or more sources of taxable income, and (c) the money or property the defendant received during that year did not come from nontaxable sources, then you may but are not required to conclude that the money or property received was taxable income to the defendant. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you must find that the People have not proved under the net worth method that the defendant had unreported taxable income.

In order to prove that the defendant had *unreported* taxable income [using the net worth method], the People must also prove that the defendant's net worth increased by an amount that was substantially greater than the income that the defendant reported on (his/her) tax return for _____ <*insert year alleged*>.

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[There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the net worth method. If the People have proved beyond a reasonable doubt that: (1) during the year, the defendant spent money in ways that did not change (his/her) net worth at the end of the year and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year. If the People also prove beyond a reasonable doubt that the money or property received did not come from nontaxable sources, then you may but are not required to conclude that the money or property was also taxable income. If you have a reasonable doubt about whether the People have proved any of these factors, you may not take the expenditures into account in applying the net worth method.]

In order to rely on the net worth method of proving income, the People must prove the defendant's net worth at the starting point with reasonable certainty. Here the starting point is January 1, _____ <*insert year alleged*>. The People are not required to prove the exact value of each and every asset the defendant owned at the starting point. However, the People must prove beyond a reasonable doubt that all the assets the defendant owned at the starting point were not enough to account for any proven increase in (his/her) net worth during the year.

In deciding whether the defendant's net worth at the starting point has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that the defendant suggests regarding assets and income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

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A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

B. Whether the People have proved the defendant's net worth at the beginning of _____ <*insert year alleged*> to a reasonable degree of certainty,

OR

C. Whether the People have proved that any increase in the defendant's net worth[, together with any nondeductible expenditures the defendant made during the year,] was substantially more than the income that the defendant reported on (his/her) tax return for _____ <*insert year alleged*>,

then you must find that the People have not proved under the net worth method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] ____].]

BENCH NOTES

Instructional Duty

If the prosecution is relying on the net worth method, the court has a **sua sponte** duty to give this instruction. (*Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 998.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving CALCRIM No. 2846, *Proof of Unreported Taxable Income: Must Still Prove Elements of Offense*.

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AUTHORITY

- Net Worth Method Explained. *Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.2 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.05.
- Sua Sponte Duty to Instruct on Method. *Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 998.
- Requirements for Proof. *Holland v. United States* (1954) 348 U.S. 121, 129–138 [75 S.Ct. 127, 99 L.Ed. 150]; see also *United States v. Sabino* (6th Cir. 2001) 274 F.3d 1053, 1071.

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2843. Determining Income: Bank Deposits Method

In this case, the People are [also] using what is called the *bank deposits method* to try to prove that the defendant had unreported taxable income. I will now explain the bank deposits method.

If the People prove that: (a) the defendant engaged in an activity that produced taxable income, (b) the defendant periodically deposited money in bank accounts in (his/her) name or under (his/her) control, and (c) the money deposited did not come from nontaxable sources, then you may but are not required to conclude that these bank deposits are taxable income. Nontaxable sources of the bank deposits include gifts, inheritances, loans, or redeposits or transfers of funds between accounts. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.

In order to prove that the defendant had *unreported* taxable income [using the bank deposits method], the People must also prove that the defendant's total taxable bank deposits were substantially greater than the income that the defendant reported on (his/her) tax return for _____ <*insert year alleged*>.

[There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the bank deposits method. If the People have proved beyond a reasonable doubt that: (1) during the year, the defendant spent money from funds not deposited in any bank and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year. If the People also prove beyond a reasonable doubt that the money or property received did not come from nontaxable sources, then you may but are not required to conclude that the money or property was also taxable income. If you have a reasonable doubt about whether the People have proved any of these factors, you may not take the expenditures into account in applying the bank deposits method.]

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In order to rely on the bank deposits method of proving taxable income, the People must prove the defendant's cash on hand at the starting point with reasonable certainty. Here the starting point is January 1, _____ <*insert year alleged*>. *Cash on hand* is cash that the defendant had in (his/her) possession at the starting point that was not in a bank account. The People do not need to show the exact amount of the cash on hand at the starting point, but the People's claimed cash-on-hand figure must be reasonably certain.

In deciding whether the claimed cash-on-hand figure has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that the defendant suggests regarding assets and income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

B. Whether the People have proved the defendant's cash on hand at the beginning of _____ <*insert year alleged*> to a reasonable degree of certainty,

OR

C. Whether the People have proved that the defendant's total bank deposits, together with any nondeductible expenditures the defendant made during the year, were substantially more than the income that the defendant reported on (his/her) tax return for _____ <*insert year alleged*>,

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then you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] ____].]

BENCH NOTES

Instructional Duty

If the prosecution is relying on the bank deposits method, the court has a **sua sponte** duty to give this instruction. (See *Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 999.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving CALCRIM No. 2846, *Proof of Unreported Taxable Income: Must Still Prove Elements of Offense*.

AUTHORITY

- Bank Deposits Method Explained. *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 997, fn. 4; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.3 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.07.
- Sua Sponte Duty to Instruct on Method. *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 999.
- Requirements for Proof. *United States v. Conaway* (5th Cir. 1993) 11 F.3d 40, 43–44; *United States v. Abodeely* (8th Cir. 1986) 801 F.2d 1020, 1024; *United States v. Boulet* (5th Cir. 1978) 577 F.2d 1165, 1167.

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2844. Determining Income: Cash Expenditures Method

In this case, the People are [also] using the *cash expenditures method* to try to prove that the defendant had unreported taxable income. I will now explain the cash expenditures method.

The cash expenditures method involves an examination of money the defendant spent during the taxable year along with (his/her) net worth at the beginning and at the end of that year.

On any given date, a person's *net worth* is the value of everything that person owns minus the value of all that person's debts and financial obligations. It is the difference between what a person owns and what that person owes. The value of any item that a person owns is measured by what it was worth when acquired, not its current market value.

If the People have proved beyond a reasonable doubt that: (1) during the year, the defendant spent money in ways that did not change (his/her) net worth at the end of the year and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year.

The People must also prove that the money or property was taxable income. In order do so, the People must prove that: (a) the defendant had one or more sources of taxable income, and (b) the money or property the defendant received during the year did not come from nontaxable sources. Nontaxable sources of income include gifts, inheritances, loans, or redeposits or transfers of funds between bank accounts. If you have a reasonable doubt about whether the People have proved any of these factors, you must find that the People have not proved under the cash expenditures method that the defendant had unreported taxable income.

In order to prove that the defendant had *unreported* taxable income [using the cash expenditures method], the People must prove that the defendant's cash expenditures establish taxable income that was substantially greater than the income that (he/she) reported on (his/her) tax return for _____ <*insert year alleged*>.

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[There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the cash expenditures method. If the People prove that the defendant's net worth increased during _____ <*insert year alleged*>, then you may but are not required to conclude that the defendant received money or property during that year. In order to prove that the money or property received was taxable income, the People must also prove that: (1) the defendant had one or more sources of taxable income and (2) the money or property the defendant received during the year did not come from nontaxable sources. If the People have proved that: (a) the defendant's net worth increased during _____ <*insert year alleged*>, (b) the defendant had one or more sources of taxable income, and (c) the money or property the defendant received during the year did not come from nontaxable sources, then you may but are not required to conclude that the money or property received was taxable income to the defendant. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you may not take any increase in the defendant's net worth into account in applying the cash expenditures method.]

In order to rely on an increase in the defendant's net worth to prove unreported taxable income under the cash expenditures method, the People must prove the defendant's net worth at the starting point with reasonable certainty. Here the starting point is January 1, _____ <*insert year alleged*>. The People are not required to prove the exact value of each and every asset defendant owned at the starting point. However, the People must prove beyond a reasonable doubt that all the assets defendant owned at the starting point were not enough to account for any proven increase in the defendant's net worth during the year.

In deciding whether the defendant's net worth at the starting point has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that defendant suggests regarding assets and

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income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

B. Whether the People have proved the defendant's net worth at the beginning of _____ <*insert year alleged*> to a reasonable degree of certainty,

OR

C. Whether the People have proved that any nondeductible expenditures the defendant made during the year, together with any increase in the defendant's net worth, were substantially more than the income that the defendant reported on (his/her) tax return for _____ <*insert year alleged*>,

then you must find that the People have not proved under the cash expenditures method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] ____].]

BENCH NOTES

Instructional Duty

If the prosecution is relying on the cash expenditures method, the court has a **sua sponte** duty to give this instruction. (See *Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; *United States v. Hall* (1981) 650 F.2d 994, 998.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

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Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving CALCRIM No. 2846, *Proof of Unreported Taxable Income: Must Still Prove Elements of Offense*.

AUTHORITY

- Cash Expenditures Method Explained. *United States v. Caswell* (8th Cir. 1987) 825 F.2d 1228, 1231–1232; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.4 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.07.
- Sua Sponte Duty to Instruct on Method. See *Holland v. United States* (1954) 348 U.S. 121, 129 [75 S.Ct. 127, 99 L.Ed. 150]; *United States v. Hall* (1981) 650 F.2d 994, 998.
- Requirements for Proof. *United States v. Caswell* (8th Cir. 1987) 825 F.2d 1228, 1231–1232; *United States v. Citron* (2d Cir. 1986) 783 F.2d 307, 315–316; *Taglianetti v. United States* (1st Cir. 1968) 398 F.2d 558, 562–563, 565.

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2845. Determining Income: Specific Items Method

In this case, the People are [also] using the *specific items method* to try to prove that the defendant had unreported taxable income. I will now explain the specific items method.

In order to prove that the defendant received unreported taxable income under the specific items method, the People must prove that:

1. **The defendant received income during _____ <*insert year alleged*>;**
2. **The income the defendant received was taxable;**

AND

3. **The income the defendant received was substantially greater than the income (he/she) reported on (his/her) tax return for _____ <*insert year alleged*>.**

If you have a reasonable doubt about whether the People have proved 1, 2, or 3, you must find that the People have not proved under the specific items method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crimes[s] charged [in Count[s] ____].]

BENCH NOTES

Instructional Duty

It is unclear if the court has a **sua sponte** duty to instruct on the specific items method of proof. If the prosecution is relying on this method and another method of proof, the court should instruct on both methods. (See *United States v. Meriwether* (5th Cir. 1971) 440 F.2d 753, 756–757 [reversed because instructions on specific items and net worth method not sufficiently clear].)

The court **must also give** the appropriate instruction on the elements of the offense charged.

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Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving CALCRIM No. 2846, *Proof of Unreported Taxable Income: Must Still Prove Elements of Offense*.

AUTHORITY

- Specific Items Method Explained. *United States v. Hart* (6th Cir. 1995) 70 F.3d 854, 860; *United States v. Black* (D.C. Cir. 1988) 843 F.2d 1456, 1459; *United States v. Marabelles* (9th Cir. 1984) 724 F.2d 1374, 1379, fn. 3.

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2846. Proof of Unreported Taxable Income: Must Still Prove Elements of Offense

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If you conclude based on the (net worth[,]/ [or] bank deposits[,]/ [or] cash expenditures[,]/ [or] specific items) method that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] ____].

BENCH NOTES

Instructional Duty

If the court is instructing on multiple methods of proving unreported taxable income, the court may give this instruction once, after explaining some or all of the methods, rather than repeating the last paragraph of each instruction on each method.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.03[1] (Matthew Bender).

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E. DEFENSES

2860. Defense: Good Faith Belief Conduct Legal

The defendant did not voluntarily and intentionally violate a legal duty known to (him/her) if (he/she) had a good faith but mistaken understanding of what (his/her) duty was under the law. This is so even if the mistaken understanding was due to (his/her) own negligence. If the defendant actually believed that (he/she) was meeting the requirements of the tax laws, (his/her) belief did not have to be reasonable.

[A person's (opinion that the tax laws violate his or her constitutional rights/ [or] disagreement with the government's tax collection system) does not constitute a good faith misunderstanding of the law.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in good faith. If the People have not met this burden, you must find the defendant not guilty of the crime[s] charged [in Count[s] ____] [or the lesser offense[s] of _____ <*insert description of lesser offense[s]*>].

BENCH NOTES

Instructional Duty

The defendant may assert as a defense a good faith belief that his or her conduct was legal. (*People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563]; *Cheek v. United States* (1991) 498 U.S. 192, 201 [111 S.Ct. 604, 112 L.Ed.2d 617].) This includes asserting that the defendant was ignorant of the law or mistaken in his or her interpretation of it. (*People v. Hagen, supra,* 19 Cal.4th at p. 660; *Cheek v. United States, supra,* 498 U.S. at p. 201.) Further, the defendant's belief need not be objectively reasonable. (*People v. Hagen, supra,* 19 Cal.4th at p. 660; *Cheek v. United States, supra,* 498 U.S. at p. 201.) If there is sufficient evidence to raise a reasonable doubt about a good faith belief, the court has a **sua sponte** duty to give this instruction.

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The good faith belief defense does not apply to a "tax protestor," who asserts that the tax law is illegal or unconstitutional. (*Cheek v. United States* (1991) 498 U.S. 192, 206 [111 S.Ct. 604, 112 L.Ed.2d 617]; *United States v. Bressler* (7th Cir. 1985) 772 F.2d 287, 291.) On the other hand, "[w]e must remind ourselves here that the good-faith defense need not be rational, if there is sufficient evidence from which a reasonable jury could conclude that even irrational beliefs were truly held." (*United States v. Mann* (10th Cir. 1989) 884 F.2d 532, 536–537 [reversing for failure to properly instruct on good faith defense where defendant asserted that the tax laws were invalid, that he believed he did not fall under them, and that the system was maintained by "Satan's little helpers"]; see also *Cheek v. United States, supra,* 498 U.S. at p. 203 [preventing jury from considering good faith defense based on "irrational belief" would raise constitutional problems].) Thus, while the court may exclude evidence that the defendant disagreed with the tax laws (*Cheek v. United States, supra,* 498 U.S. at p. 206), the court should use caution. If the court concludes that there is sufficient basis to instruct on the good faith defense but evidence that the defendant actions were based on a disagreement with the tax system has also been admitted, the court may give the bracketed sentence that begins with "A person's opinion . . . ."

AUTHORITY

- Good Faith Belief Defense. *People v. Hagen* (1998) 19 Cal.4th 652, 660 [80 Cal.Rptr.2d 24, 967 P.2d 563]; *Cheek v. United States* (1991) 498 U.S. 192, 201 [111 S.Ct. 604, 112 L.Ed.2d 617]; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.
- Disagreement With Law Is Not Good Faith Misunderstanding. *Cheek v. United States* (1991) 498 U.S. 192, 206 [11 S.Ct. 604, 112 L.Ed.2d 617]; *United States v. Bressler* (7th Cir. 1985) 772 F.2d 287, 291.
- Belief Need Not Be Rational. *Cheek v. United States* (1991) 498 U.S. 192, 203 [111 S.Ct. 604, 112 L.Ed.2d 617]; *United States v. Mann* (10th Cir. 1989) 884 F.2d 532, 536–537.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

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2861. Defense: Reliance on Professional Advice

The defendant did not voluntarily and intentionally violate a legal duty known to (him/her) if, (in preparing (his/her) (tax return[,]/ [or] statement[,]/ [or other] document[s] filed with the Franchise Tax Board)/ [or] failing to file a tax return), (he/she) relied in good faith on the advice of _____ <*insert name of person allegedly relied on*>, who represented (himself/herself) to be (a/an) (accountant/attorney/_____ <*insert other professional*>) qualified to provide such advice.

The defendant did not rely on the advice in good faith if:

1. **The defendant did not give _____ <*insert name of person allegedly relied on*> all the information about the defendant's income and expenses for the year(;/.)**

AND

<*Alternative 2A—defendant charged with filing false or inaccurate document*>

[2A. When the defendant submitted the (tax return[,]/ [or] statement[,]/ [or other] document) to the Franchise Tax Board, (he/she) knew or had reason to believe that the information contained in the document was incorrect or false.]

[OR]

<*Alternative 2B—defendant charged with failing to file*>

[(2B). When the defendant chose not to file a tax return based on _____'s <*insert name of person allegedly relied on*> advice, (he/she) knew or had reason to believe that the advice was incorrect or false.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not rely in good faith on the advice of _____ <*insert name of person allegedly relied on*>. If the People have not met this burden, you must find the defendant not guilty of the crime[s] charged [in Count[s] ____] [or the lesser offense[s] of _____ <*insert description of lesser offense[s]*>].

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BENCH NOTES

Instructional Duty

The defendant may assert as a defense good faith reliance on the advice of a professional. (*United States v. Segal* (8th Cir. 1988) 867 F.2d 1173, 1179; *United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) "[T]he defendant must show he actually relied on expert advice and that his reliance was in good faith." (*United States v. Segal, supra,* 867 F.2d at p. 1179.) Further, this defense is not available if the defendant failed to provide the professional with all of the relevant information or knew that the document was false or inaccurate when submitted. (*United States v. Claiborne* (9th Cir. 1985) 765 F.2d 784, 798; see also *United States v. Segal, supra,* 867 F.2d at p. 1179 [defendant, charged with failing to file tax return, knew advice was inaccurate].) If there is sufficient evidence to raise a reasonable doubt that the defendant relied on professional advice, the court has a **sua sponte** duty to give this instruction.

Give alternative A if the defendant is charged with filing a false tax return or document. Give alternative B if the defendant is charged with failing to file a tax return. The court may give both alternatives if appropriate based on the evidence.

AUTHORITY

- Reliance on Advice Defense. *United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; *United States v. Platt* (2d Cir. 1970) 435 F.2d 789, 792–793; *Bursten v. United States* (5th Cir. 1968) 395 F.2d 976, 981; *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1117, disapproved on other grounds by Schad v. Arizona (1991) 501 U.S. 624, 634–635 [111 S.Ct. 2491, 115 L.Ed.2d 555]; *United States v. Phillips* (7th Cir. 1954) 217 F.2d 435, 440; *United States v. Claiborne* (9th Cir. 1985) 765 F.2d 784, 798; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.
- Reliance Must Be Actual and in Good Faith. *United States v. Segal* (8th Cir. 1988) 867 F.2d 1173, 1179; *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1116.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

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VANDALISM, LOITERING, TRESPASS, AND OTHER MISCELLANEOUS OFFENSES

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B. LOITERING

2915. Loitering
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C. TRESPASS

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2930. Trespass: To Interfere With Business
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2933. Trespass: Person Present
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D. DANGEROUS ANIMAL

2950. Failing to Maintain Control of a Dangerous Animal
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E. ALCOHOL RELATED OFFENSES (NON-DRIVING)

2960. Possession of Alcoholic Beverage by Person Under 21
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2962. Selling or Furnishing Alcoholic Beverage to Person Under 21
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F. OFFENSES INVOLVING CARE OF MINOR

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G. BETTING

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2992. Keeping a Place for Recording Bets
2993. Receiving or Holding Bets
2994. Recording Bets
2995. Permitting Place to Be Used for Betting Activities
2996. Betting or Wagering
2997–3099. Reserved for Future Use

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A. VANDALISM

2900. Vandalism

The defendant is charged [in Count ____] with vandalism.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property;**

[AND]

2. **The defendant (did not own the property/owned the property with someone else)(;/.)**

<See Bench Notes regarding when to give element 3.>

[AND

3. **The amount of damage caused by the vandalism was ($400 or more/less than $400).]**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

***Graffiti or other inscribed material* includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony for causing $400 or more in damage and the court is *not* instructing on the misdemeanor offense, give

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element 3 selecting the "$400 or more" language. If the court *is* instructing on both the felony and the misdemeanor offenses, do not give element 3 but do give CALCRIM No. 2901, *Vandalism: Amount of Damage*, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give CALCRIM No. 2901 if the defendant is charged with causing more than $10,000 in damage under Penal Code section 594(b)(1).

If the defendant is charged with only a misdemeanor, give element 3 with the "less than $400" language.

In element 2, give the alternative language "owned the property with someone else" if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722] [Pen. Code, § 594 includes damage by spouse to spousal community property].)

AUTHORITY

- Elements. Pen. Code, § 594.
- Malicious Defined. Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Damage to Jointly Owned Property. *People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 243–245.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.11[2], Ch. 144, *Crimes Against Order,* § 144.03[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is $400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form on which the jury will indicate if the amount of damage has or has not been proved to be $400 or more. If the jury finds

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that the damage has not been proved to be $400 or more, then the offense should be set at a misdemeanor.

RELATED ISSUES

Lack of Permission Not an Element

The property owner's lack of permission is not an element of vandalism. (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1014 [34 Cal.Rptr.2d 864].)

Damage Need Not Be Permanent

To "deface" under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [102 Cal.Rptr.2d 511] [writing on a glass window with a marker pen was defacement under the statute].)

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2901. Vandalism: Amount of Damage

If you find the defendant guilty of vandalism [in Count[s] ____], you must then decide whether the People have proved that the amount of damage caused by the vandalism [(in each count/in Count[s] ____)] was $400 or more. [If you decide that the amount of damage was $400 or more, you must then decide whether the People have proved that the damage [(in each count/in Count[s] ____)] was also $10,000 or more.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on these sentencing factors.

This instruction **must** be given with CALCRIM No. 2900, *Vandalism*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved that the damage was $400 or more and, if appropriate, $10,000 or more.

AUTHORITY

- Elements. Pen. Code, § 594(b)(1).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 243–245.

RELATED ISSUES

Damage Cannot Be Aggregated

The prosecution cannot charge a felony for vandalism based on the aggregate damage done to property owned by multiple victims. (*In re*

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David (1997) 52 Cal.App.4th 304, 310–311 [60 Cal.Rptr.2d 552].)

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2902. Damaging Phone or Electrical Line

The defendant is charged [in Count ____] with (taking down[,]/ [or] removing [,]/ [or] damaging[,]/ [or] obstructing/severing/ making an unauthorized connection to) a (telegraph/telephone/ cable television/electrical) line.

To prove that the defendant is guilty of this crime, the People must prove that:

<*Alternative 1A—removed, damaged, or obstructed*>

[1. The defendant unlawfully (took down[,]/ [or] removed[,]/ [or] damaged[,]/ [or] obstructed) [part of] a (telegraph/ telephone/cable television/electrical) line [or mechanical equipment connected to the line];]

<*Alternative 1B—severed*>

1. The defendant unlawfully severed a wire of a (telegraph/ telephone/cable television/electrical) line;]

<*Alternative 1C—unauthorized connection*>

[1. The defendant unlawfully made an unauthorized connection with [part of] a line used to conduct electricity [or mechanical equipment connected to the line];]

AND

2. The defendant did so maliciously.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[As used here, *mechanical equipment* includes a telephone.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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The statute uses the term "injure." (Pen. Code, § 591.) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

The statute uses the phrase "appurtenances or apparatus." (Pen. Code, § 591.) The committee has chosen to use the more understandable "mechanical equipment" in place of this phrase.

Give the bracketed sentence that states "*mechanical equipment* includes a telephone" on request. (*People v. Tafoya* (2001) 92 Cal.App.4th 220, 227 [111 Cal.Rptr.2d 681]; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704 [66 Cal.Rptr. 582].)

AUTHORITY

- Elements. Pen. Code, § 591.
- Maliciously Defined. Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Applies to Damage to Telephone. *People v. Tafoya* (2001) 92 Cal.App.4th 220, 227; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704 [66 Cal.Rptr. 582].
- "Obstruct" Not Unconstitutionally Vague. *Kreiling v. Field* (9th Cir. 1970) 431 F.2d 502, 504.
- Applies to Theft of Service. *People v. Trieber* (1946) 28 Cal.2d 657, 661 [171 P.2d 1].

Seconday Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 258.

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B. LOITERING

2915. Loitering

The defendant is charged [in Count ____] with loitering.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant delayed, lingered, prowled, or wandered on the private property of someone else;**
2. **When the defendant was on that property, (he/she) did not have a lawful purpose for being there;**
3. **When the defendant was on the property, (he/she) intended to commit a crime if the opportunity arose;**

AND

4. **The defendant's purpose for being on the property was to commit a crime if the opportunity arose.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 647(h).
- Specific Intent to Commit Crime Required. *In re Cregler* (1961) 56 Cal.2d 308, 311–312 [14 Cal.Rptr. 289, 363 P.2d 305]; see *In re Joshua M.* (2001) 91 Cal.App.4th 743, 746–747 [110 Cal.Rptr.2d 662].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 51.

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.20 (Matthew Bender).

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2916. Loitering: Peeking

The defendant is charged [in Count ____] with peeking in the door or window of an inhabited (building/ [or] structure).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant delayed, lingered, prowled, or wandered on the private property of someone else;**
2. **When the defendant was on that property, (he/she) did not have a lawful purpose for being there;**

AND

3. **When the defendant was on the property, (he/she) peeked in the door or window of an inhabited building or structure.**

[A (building/ [or] structure) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged peeking.]

[A (building/ [or] structure) is *not inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 647(i).
- Specific Intent to Commit Crime Not Required. *In re Joshua M.* (2001) 91 Cal.App.4th 743, 746–747 [110 Cal.Rptr.2d 662].
- Inhabitation Defined. See Pen. Code, § 459.
- House Not Inhabited If Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 51.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.20 (Matthew Bender).

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2917. Loitering: About School

The defendant is charged [in Count ____] with loitering at or near (a school children attend/ [or] a public place where children normally congregate).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant delayed, lingered, or idled at or near (a school children attend/ [or] a public place where children normally congregate);**
2. **The defendant remained at, reentered, or returned to (a school children attend/ [or] a public place where children normally congregate) within 72 hours after being asked to leave by (the chief administrative official of that school/the person acting as the chief administrative official/an authorized member of the security patrol of the school district/a city police officer/a sheriff or deputy sheriff/a California Highway Patrol peace officer);**
3. **When the defendant was at or near the (school/ [or] public place), (he/she) did not have a lawful purpose for being there;**

AND

4. **When the defendant was at or near the (school/ [or] public place), (he/she) intended to commit a crime if the opportunity arose.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Pen. Code, § 653g.
- Specific Intent to Commit Crime Required. *In re Christopher S.* (1978) 80 Cal.App.3d 903, 911 [146 Cal.Rptr. 247]; *People v. Hirst* (1973) 31 Cal.App.3d 75, 82–83 [106 Cal.Rptr. 815]; *People v. Frazier* (1970) 11 Cal.App.3d 174, 183 [90 Cal.Rptr. 58]; *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 663 [81 Cal.Rptr. 173].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 52.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.02 (Matthew Bender).

RELATED ISSUES

Activity Protected by First Amendment

In *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 670–674 [81 Cal.Rptr. 173], the court held that the defendant could not be convicted of loitering near a school for an unlawful purpose when the defendant was giving the students leaflets protesting the war and calling for a student strike. (See also *People v. Hirst* (1973) 31 Cal.App.3d 75, 85–86 [106 Cal.Rptr. 815].)

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C. TRESPASS

2929. Trespass After Making Credible Threat

The defendant is charged [in Count ____] with trespass after making a credible threat.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant made a credible threat to cause serious bodily injury to another person;**
2. **The defendant made the threat with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family];**

AND

<Alternative 3A—entered home>

[3. Within 30 days of making the threat, the defendant unlawfully entered the threatened person's residence[, or the real property next to the residence of the threatened person,] without a lawful purpose and with the intent to carry out the threat against the target of the threat.]

<Alternative 3B—entered workplace>

[3. Within 30 days of making the threat, the defendant unlawfully entered the workplace of the threatened person, knowing that the place (he/she) entered was the threatened person's workplace, and tried to locate that person without a lawful purpose and with the intent to carry out the threat.]

A *credible threat* is one that causes the target of the threat to reasonably fear for his or her safety [or for the safety of his or her immediate family] and one that the maker of the threat appears able to carry out.

A credible threat may be made orally, in writing, or electronically or may be implied by a pattern of conduct or a combination of statements and conduct.

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A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

To decide whether the defendant unlawfully entered the threatened person's (residence[or the real property next to the residence]/workplace), please refer to the separate instructions that I (will give/have given) you on unlawful entry.

[*Immediate family* means (a) a spouse, parent, or child; (b) a grandchild, grandparent, brother, or sister related by blood or marriage; and (c) a person who regularly lives in the household [or who regularly lived there within the six months before the alleged incident].]

[A threat may be made *electronically* by using a telephone, cellular telephone, pager, computer, video recorder, fax machine, or other similar electronic communication device.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give alternative 3A or 3B depending on whether the prosecution alleges that the defendant entered the threatened person's residence or property next to that residence, or entered the threatened person's workplace. (Pen. Code, §§ 601(a)(1) & (2).)

Give the appropriate instruction defining "unlawful entry" depending on the evidence. (See CALCRIM Nos. 2930–2933.)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, give on request the bracketed phrases in element 2 and in the definition of "credible threat," as well as the bracketed paragraph defining "immediate family." (Pen. Code, §§ 601(a), 646.9(*l*); see Fam. Code, § 6205 ["affinity" defined]; Prob. Code, §§ 6401, 6402 [degrees for purposes of intestate succession].)

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If there is evidence that a threat was communicated through an "electronic communication device," give on request the bracketed paragraph listing the different means of electronically communicating a threat. (See Pen. Code, § 646.9(h) [in context of stalking]; 18 U.S.C. § 2510(12).)

Related Instruction

CALCRIM No. 1301, *Stalking*.

AUTHORITY

- Elements. Pen. Code, § 601(a).
- Credible Threat Defined. See Pen. Code, § 646.9(g); *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624] [both in context of stalking].
- Immediate Family Defined. Pen. Code, §§ 601(a), 646.9(*l*).
- Serious Bodily Injury Defined. Pen. Code, §§ 243(f)(4), 417.6(b), 601(a).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11A[2], Ch. 143, *Crimes Against Property,* § 143.10[2][d] (Matthew Bender).

RELATED ISSUES

Labor Union Activities

Penal Code section 601 does not apply to any person who is engaged in labor union activities that are permitted by the California Agricultural Labor Relations Act (see Lab. Code, § 1140 et seq.) or by the National Labor Relations Act (29 U.S.C. § 151 et seq.). (Pen. Code, § 601(c).)

Personal Residence, Real Property, or Workplace

Penal Code section 601 does not apply if the person making the threat enters his or her own residence, real property, or workplace. (Pen. Code, § 601(b).)

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2930. Trespass: To Interfere With Business

The defendant is charged [in Count ____] with trespassing.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully entered (land/ [or] a building) belonging to someone else;**
2. **When the defendant entered, (he/she) intended (to damage someone else's property [or property right]/ [or] to interfere with, obstruct, or damage a lawful business or occupation carried on by the (owner of the land[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the land));**

AND

3. **The defendant actually did (damage someone else's property [or property right]/ [or] interfere with, obstruct, or damage a lawful business or occupation carried on by the (owner of the land[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the land)).**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute uses the term "injure." (Pen. Code, § 602(k).) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

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AUTHORITY

- Elements. Pen. Code, § 602(k).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Actual Damage Required. *In re Wallace* (1970) 3 Cal.3d 289, 295 [90 Cal.Rptr. 176, 475 P.2d 208]; *In re Ball* (1972) 23 Cal.App.3d 380, 386 [100 Cal.Rptr. 189].
- "Land" Includes Building on the Land. *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 917–919 [47 Cal.Rptr. 662].
- Agent Defined. Civ. Code, § 2295.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

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2931. Trespass: Unlawfully Occupying Property

The defendant is charged [in Count ____] with trespassing.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully entered (land/ [or] a building) belonging to someone else without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property);**
2. **After the defendant entered, (he/she) occupied the (land/ [or] building) without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property);**
3. **The defendant occupied some part of the (land/ [or] building) continuously until removed.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 602(m).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Entry Must Be Without Consent. *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921 [47 Cal.Rptr. 662]; *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 932 [47 Cal.Rptr. 670], disapproved on other grounds in *In re Hayes* (1969) 70 Cal.2d 604, 614, fn. 2 [75 Cal.Rptr. 790, 491 P.2d 430].

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- Occupy Defined. *People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 909–911 [56 Cal.Rptr. 261].
- "Land" Includes Building on the Land. *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 917–919 [47 Cal.Rptr. 662] [partially abrogated by statute].
- Agent Defined. Civ. Code, § 2295.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

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2932. Trespass: Entry Into Dwelling

The defendant is charged [in Count ____] with trespassing.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully entered or remained in a noncommercial (dwelling house[,]/ [or] apartment[,]/ [or other] residential place) belonging to someone else;**

[AND]

2. **The defendant entered or remained without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property)(;/.)**

<Give element 3 if evidence shows defendant may have been public officer.>

[AND

3. **The defendant was not a public officer or employee acting in the lawful performance of (his/her) duties as a public officer or employee.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with aggravated trespass under Penal Code section 602.5(b), the court **must** also give CALCRIM No. 2933, *Trespass: Person Present*, with this instruction.

If there is sufficient evidence that the defendant was a public officer or employee, the court has a **sua sponte** duty to instruct on the defense. Give

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bracketed element 3. If lawful performance is an issue, the court has a **sua sponte** duty to instruct on when a public officer is lawfully performing his or her duties and that the prosecution has the burden of proving lawful performance beyond a reasonable doubt. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) For instructions on lawful performance by a public officer, see CALCRIM Nos. 2670–2673.

AUTHORITY

- Elements. Pen. Code, § 602.5(a) & (b).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Entry Need Not Be Without Consent. See *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921 [47 Cal.Rptr. 662].
- Building Must Be Used for Residential Purposes. *In re D. C. L.* (1978) 82 Cal.App.3d 123, 125–126 [147 Cal.Rptr. 54].
- Agent Defined. Civ. Code, § 2295.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.10[2][d] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with aggravated trespass under Penal Code section 602.5(b) based on another person being present in the building, then "nonaggravated" trespass is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the aggravating factor has been proved. If the jury finds that the factor has not been proved, then the offense should be set at the lower level misdemeanor.

RELATED ISSUES

Not Necessarily a Lesser Included Offense of Burglary

Trespassing in violation of Penal Code section 602.5 is not necessarily a lesser included offense of burglary based on the elements test. (*People v.*

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Lohbauer (1981) 29 Cal.3d 364, 369 [173 Cal.Rptr. 453, 627 P.2d 183].) A violation of Penal Code section 602.5 may be a lesser included offense of burglary depending on how that offense is charged. (See *People v. Waidla* (2000) 22 Cal.4th 690, 733 [94 Cal.Rptr.2d 396, 996 P.2d 46] [assuming for argument that trespass was a lesser included offense of burglary under accusatory pleading test].)

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2933. Trespass: Person Present

If you find the defendant guilty of trespassing, you must then decide whether the People have proved that a resident [or other person authorized to be in the dwelling] was present at some time while the defendant was trespassing.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the defendant is charged with aggravated trespass under Penal Code section 602.5(b).

This instruction **must** be given with CALCRIM No. 2932, *Trespass: Entry Into Dwelling*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not proved that another person was present.

AUTHORITY

- Elements. Pen. Code, § 602.5(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

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D. DANGEROUS ANIMAL

2950. Failing to Maintain Control of a Dangerous Animal

The defendant is charged [in Count ____] with causing (injury/ death) by failing to maintain control of a dangerous animal.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/ [or] had custody or control of) a dangerous animal;**
2. **The defendant knew that the animal was dangerous;**

<Alternative 3A—allowed to run free>

[3. The defendant willfully allowed the animal to run free;]

<Alternative 3B—failed to use ordinary care>

[3. The defendant failed to use ordinary care in keeping the animal;]

[AND]

4. **The animal (killed/caused serious bodily injury to)** _____ *<insert name of person allegedly attacked>* **while the defendant (allowed it to run free/failed to use ordinary care in keeping it)(;/.)**

<Give element 5 unless alleged victim not capable of taking precautions; see Bench Notes.>

[AND

5. _____ *<insert name of person allegedly attacked>* **took all the precautions that a reasonable person would have taken in the same situation.]**

[If the People have proved that _____ *<insert name of person allegedly attacked>* **was (under the age of five years/incapable of taking reasonable precautions because** _____ *<insert reason for incapacity>*)**, then the People do not need to prove item 5 and you do not have to find that (he/she) took all the precautions**

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that a reasonable person would have taken in the same situation.]

[Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to use ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

In element 3, give either alternative 3A or 3B as appropriate based on the facts of the case. When giving alternative 3A, also give the definition of "willfully." When giving alternative 3B, also give the definition of "ordinary care."

The first bracketed paragraph is for use when the victim is by law incapable of being held to the ordinary standard of care under the law of negligence. (See *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786 [2 Cal.Rptr.2d 416] [children under five are deemed incapable of negligent acts.]) If the parties agree that the alleged victim was under five years old or incapable of taking responsible precautions, the court may omit element 5 and not give the bracketed paragraph.

AUTHORITY

- Elements. Pen. Code, § 399.

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- Victim Incapable of Negligence Due to Lack of Capacity. *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786 [2 Cal.Rptr.2d 416].
- Definition of Dangerous Animal. *Sea Horse Ranch Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 460 [30 Cal.Rptr.2d 681].
- Negligence—Ordinary Care. Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 440.

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2951. Negligent Control of Attack Dog

The defendant is charged [in Count ____] with failing to use ordinary care in (owning/ [or] controlling) an attack dog.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/ [or] had custody or control of) a dog trained to fight, attack, or kill;**
2. **The defendant knew or reasonably should have known that the dog was vicious or dangerous;**
3. **The defendant failed to use ordinary care in (owning/ [or] controlling) the dog;**

[AND]

4. **As a result of the defendant's failure to use ordinary care, the dog (bit someone on two separate occasions/caused substantial physical injury to _____ <*insert name[s] of person[s] allegedly attacked*>)(;/.)**

<Give element 5 unless alleged victim not capable of taking precautions; see Bench Notes.>

[AND

5. **_____ <*insert name[s] of person[s] allegedly attacked*> took all the precautions that a reasonable person would have taken in the same situation.]**

[If the People have proved that _____ <*insert name[s] of person[s] allegedly attacked*> (was/were) (under the age of five years/ [or] incapable of taking reasonable precautions because _____ <*insert reason for incapacity*>), then the People do not need to prove item 5 and you do not have to find that (he/she/ they) took all the precautions that a reasonable person would have taken in the same situation.]

Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to use ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to

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do something that a reasonably careful person would do in the same situation).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The first bracketed paragraph is to be used when the victim is by law incapable of being held to the ordinary standard of care under the law of negligence. (See *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786 [2 Cal.Rptr.2d 416] [children under five are deemed incapable of negligent acts.]) If the parties agree that the alleged victim was under five years old or incapable of taking responsible precautions, the court may omit element 5 and not give the bracketed paragraph.

Penal Code section 399.5(c) states that "nothing in this section shall authorize the bringing of an action pursuant to" three listed situations. If any of these defenses are raised, give CALCRIM No. 2952, *Defenses: Negligent Control of Attack Dog*.

AUTHORITY

- Elements. Pen. Code, § 399.5.
- Victim Incapable of Negligence Due to Lack of Capacity. *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786 [2 Cal.Rptr.2d 416].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 366.

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2952. Defenses: Negligent Control of Attack Dog

You must find the defendant not guilty of failing to use ordinary care in (owning/ [or] controlling) an attack dog if:

<Alternative A—trespassing>

[_____ <*insert name[s] of person[s] allegedly attacked*> (was/were) trespassing at the time (he/she/they) (was/were) bitten by the dog][; or/.]

<Alternative B—provocation>

[_____ <*insert name[s] of person[s] allegedly attacked*> provoked the dog or otherwise contributed to (his/her/their) own injuries][; or/.]

<Alternative C—dog doing military or police work>

[The dog was being used in military or police work and the biting occurred while the dog was actually performing in that capacity.]

[A *trespasser* is someone who (enters a residence without the consent of the (owner/owner's agent/person who lawfully possesses the property)[,]/ [or] enters land (enclosed by a fence/ [or] posted with "no trespassing" signs) and refuses to leave the property when requested to do so by the (owner/owner's agent/ person who lawfully possesses the property)[,]/ [or] _____ <*insert other definition of trespasser, see Pen. Code, § 602 et seq.*>).]

[*Provoking* includes, but is not limited to, approaching, in a threatening manner, the owner or custodian of a dog held on a leash so that the dog reacts in a protective manner.]

<Alternative A—reasonable doubt standard>

[The People have the burden of proving beyond a reasonable doubt that (_____ <*insert name[s] of person[s] allegedly attacked*> (was/were) not trespassing[,]/ [or] [_____ <*insert name[s] of person[s] allegedly attacked*>] did not provoke the dog[,]/ [or] the dog was not being used in military or police

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work). If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Alternative B—preponderance standard>

[The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that (_____ <*insert name[s] of person[s] allegedly attacked*> (was/were) trespassing[,]/ [or] [_____ <*insert name[s] of person[s] allegedly attacked*>] provoked the dog[,]/ [or] the dog was being used in military or police work).

BENCH NOTES

Instructional Duty

Penal Code section 399.5(c) states that "nothing in this section shall authorize the bringing of an action pursuant" to this statute in the three situations described above: i.e., the bitten trespasser; the injured party who provokes the dog or who contributes to his or her own injuries; or the police or military dog performing in that capacity. No case presently addresses the issue of who must bear the burden of proving the existence or nonexistence of these facts.

Because the very bringing of a prosecution is barred under the circumstances stated in subdivision (c), it appears the Legislature intended to place these factual situations outside the scope of its criminal prohibition. This is to be contrasted with affirmative defenses such as entrapment, where the defendant's conduct is within the statute's facial reach but subject to an exception to the general rule based on considerations other than guilt or innocence. (See *People v. Mower* (2002) 28 Cal.4th 457, 476–483 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing at length affirmative defenses and burdens of proof]; 4 Witkin & Epstein, California Criminal Law (3d ed. 2000), Pretrial Proceedings, § 202.) That being so, the burden of proving beyond a reasonable doubt the nonexistence of the subdivision (c) circumstances would properly be placed on the prosecution. (See *People v. Mower, supra*, 28 Cal.4th at p. 482 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) However, there must still be sufficient

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evidence to permit a reasonable jury to have a reasonable doubt about whether one or more of the circumstances existed before an instruction on this issue would be required.

Alternative paragraphs on both the reasonable doubt and preponderance of the evidence standards have been included. The court must choose, at its discretion, either alternative A—reasonable doubt standard, or alternative B—preponderance standard.

AUTHORITY

- Defenses. Pen. Code, § 399.5(c).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 366.

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E. ALCOHOL RELATED OFFENSES (NON-DRIVING)

2960. Possession of Alcoholic Beverage by Person Under 21

The defendant is charged [in Count ____] with [unlawfully] possessing an alcoholic beverage when under 21 years old.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed an alcoholic beverage (in/on) a (street[,]/ [or] highway[,]/ [or] public place[,]/ [or] a place open to the public);**

AND

2. **At the time, the defendant was under 21 years old.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[Two or more persons may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<*Defense: Following Reasonable Adult Instructions*>

[The defendant did not unlawfully possess an alcoholic beverage if (he/she) was following, in a timely manner, the reasonable instructions of (his/her) (parent/legal guardian/responsible adult relative/employer/_____ <*insert name or description of person designated by parent or legal guardian*>) to deliver [or dispose of]

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the alcoholic beverage. The People have the burden of proving beyond a reasonable doubt that the defendant was not following such instructions. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

Business and Professions Code section 25662 allows for the lawful possession of alcohol by a minor if authorized by a responsible adult for a limited purpose. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

- Elements. Bus. & Prof. Code, § 25662(a).
- Alcoholic Beverage Defined. Bus. & Prof. Code, § 23004.
- Authorized Possession Defense. See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17]; *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

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2961. Purchase of Alcoholic Beverage by Person Under 21

The defendant is charged [in Count ____] with (purchasing/ [or] (drinking/consuming)) an alcoholic beverage when under 21 years old.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—purchased>

[1. The defendant purchased an alcoholic beverage;]

<Alternative 1B—drank or consumed>

[1. The defendant (drank/consumed) an alcoholic beverage at a business that was lawfully licensed to sell alcoholic beverages;]

AND

2. At the time, the defendant was under 21 years old.

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

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AUTHORITY

- Elements. Bus. & Prof. Code, § 25658(b).
- Alcoholic Beverage Defined. Bus. & Prof. Code, § 23004.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

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2962. Selling or Furnishing Alcoholic Beverage to Person Under 21

The defendant is charged [in Count ____] with [unlawfully] (selling[,]/ [or] furnishing[,]/ [or] giving away)[, or causing to be (sold[,]/ [or] furnished[,]/ [or] given away),] an alcoholic beverage to a person under 21 years old.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (sold[,]/ [or] furnished[,]/ [or] gave away)[, or caused to be (sold[,]/ [or] furnished[,]/ [or] given away),] an alcoholic beverage to** _____ <*insert name of person under 21*>;

AND

2. **When the defendant did so,** _____ <insert name of person under 21> **was under 21 years old.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer*>**.]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<*Defense: Good Faith Belief at Least 21*>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person under 21*> **was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that** _____ <*insert name of person under 21*> **was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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<Defense: Actual Reliance on Identification>

[The defendant did not unlawfully (sell[,]/ [or] furnish[,]/ [or] give away)[, or cause to be (sold[,]/ [or] furnished[,]/ [or] given away,) an alcoholic beverage to a person under 21 years old if:

1. **The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s <*insert name of person under 21*> age and identity;**
2. **_____ <*insert name of person under 21*> showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

3. **The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s <*insert name of person under 21*> age and identity.**

As used here, a *government-issued document* is a document [including a driver's license or an identification card issued to a person in the armed forces] that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. The government-issued document does not have to be genuine.

[An *agent* is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of _____'s <*insert name of person under 21*> age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. *(Ibid.)* The Court failed to state what burden of proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067], the committee has drafted the instruction on the premise that the defendant's burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. *(Ibid.)*

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra,* 28 Cal.4th at pp. 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

- Elements. Bus. & Prof. Code, § 25658(a).
- Alcoholic Beverage Defined. Bus. & Prof. Code, § 23004.
- Knowledge of Age Not an Element. *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 649, 95 P.3d 906].
- Good Faith Belief Person at Least 21 Defense. *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 649, 95 P.3d 906].

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- Bona Fide Evidence of Age Defense. Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses. See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

RELATED ISSUES

Use of Underage Decoys

The police may use underage decoys to investigate sales of alcohol to people under 21. (*Provigo Corp. v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561, 564 [28 Cal.Rptr.2d 638, 869 P.2d 1163].) Moreover, a criminal defendant may not raise as a defense the failure of the police to follow the administrative regulations regarding the use of decoys. (*People v. Figueroa* (1999) 68 Cal.App.4th 1409, 1414–1415 [81 Cal.Rptr.2d 216] [court properly denied instruction on failure to follow regulation].)

"Furnishing" Requires Affirmative Act

"In order to violate section 25658, there must be some affirmative act of furnishing alcohol. . . . It is clear that assisting with food and decorations cannot conceivably be construed as acts of 'furnishing' liquor, nor . . . can providing the room for the party, even with the knowledge that minors would be drinking. . . . A permissible inference from [the] undisputed testimony was that [the defendant] tacitly authorized his son to provide his beer to the plaintiffs. . . . Such an authorization constitutes the requisite affirmative act as a matter of law. In order to furnish an alcoholic beverage the offender need not pour the drink; it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker." (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157–1158 [721 Cal.Rptr. 675].)

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2963. Permitting Person Under 21 to Consume Alcoholic Beverage

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The defendant is charged [in Count ____] with [unlawfully] permitting a person under 21 years old to consume an alcoholic beverage.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was licensed to sell alcoholic beverages on the premises of a business;**
2. **The defendant [unlawfully] permitted** _____ <*insert name of person under 21*> **to consume an alcoholic beverage on the premises of that business;**

AND

3. **The defendant knew that** _____ <*insert name of person under 21*> **was consuming an alcoholic beverage.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer*>**.]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

The People are not required to prove that the defendant knew that _____ <*insert name of person under 21*> **was under 21.**

<*Defense: Good Faith Belief at Least 21*>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person under 21*> **was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that** _____ <*insert name of person under 21*> **was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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<Defense: Actual Reliance on Identification>

[The defendant did not unlawfully permit a person under 21 years old to consume an alcoholic beverage if:

1. **The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s** *<insert name of person under 21>* **age and identity;**
2. _____ *<insert name of person under 21>* **showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

3. **The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s** *<insert name of person under 21>* **age and identity.**

As used here, a *government-issued document* is a document [including a driver's license or an identification card issued to a person in the armed forces] that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. The government-issued document does not have to be genuine.

[An *agent* is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government issued document, as evidence of _____'s *<insert name of person under 21>* **age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

Business and Professions Code section 25660(c) provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, for a prosecution under Business and Professions Code section 25658(a), the defendant may assert as a defense a good faith belief that the person was at least 21. If the trial court concludes that this defense also applies to a prosecution under Business and Professions Code section 25658(d) and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. The court may use the bracketed language to instruct on this defense if appropriate.

AUTHORITY

- Elements. Bus. & Prof. Code, § 25658(d).
- Alcoholic Beverage Defined. Bus. & Prof. Code, § 23004.
- Bona Fide Evidence of Age Defense. Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses. See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), *Crimes Against Public Peace and Welfare*, § 291.

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RELATED ISSUES

See the Related Issues section of CALCRIM No. 2962, Selling or Furnishing Alcoholic Beverage to Person Under 21.

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2964. Purchasing Alcoholic Beverage for Person Under 21: Resulting in Death or Great Bodily Injury

The defendant is charged [in Count ____] with [unlawfully] (purchasing an alcoholic beverage for[,]/ [or] (furnishing[,]/ [or] giving[,]/ [or] giving away) an alcoholic beverage to[,]) a person under 21 years old causing (death/ [or] great bodily injury).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (purchased an alcoholic beverage for[,]/ [or] (furnished[,]/ [or] gave[,]/ [or] gave away) an alcoholic beverage to[,])** _____ <*insert name of person under 21*>**;**
2. **When the defendant did so,** _____ <*insert name of person under 21*> **was under 21 years old;**
3. _____ <*insert name of person under 21*> **consumed the alcoholic beverage;**

AND

4. _____**'s** <*insert name of person under 21*> **consumption of the alcoholic beverage caused (death/ [or] great bodily injury) to (himself/herself/ [or] another person).**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer*>**.]**

[*Great bodily injury* is significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

An act causes (death/ [or] great bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act and the (death/ [or] injury) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

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[There may be more than one cause of (death/ [or] great bodily injury). An act causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (death/ [or] injury).]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Good Faith Belief at Least 21>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person under 21*> was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____ <*insert name of person under 21*> was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Actual Reliance on Identification>

[The defendant did not unlawfully furnish an alcoholic beverage to a person under 21 years old if:

1. **The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s <*insert name of person under 21*> age and identity;**
2. **_____ <*insert name of person under 21*> showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

3. **The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s <*insert name of person under 21*> age and identity.**

As used here, a *government-issued document* is a document [including a driver's license or an identification card issued to a

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person in the armed forces] that has been, or appears to have been, issued by a government agency and contains the person's name, date of birth, description, and picture. The government-issued document does not have to be genuine.

[An *agent* is a person who is authorized to act for the defendant in dealings with other people.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of _____'s <*insert name of person under 21*> age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If there is evidence of multiple causes of death or injury, the court should also give the bracketed paragraph on causation that begins with "There may be more than one cause of (death/ [or] great bodily injury)." (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. *(Ibid.)* The Court failed to state what burden of proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122

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Cal.Rptr.2d 326, 49 P.3d 1067], the committee has drafted the instruction on the premise that the defendant's burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient evidence supporting the defense, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. *(Ibid.)*

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra,* 28 Cal.4th at pp. 478–481.) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

- Elements. Bus. & Prof. Code, §§ 25658(a) & (c).
- Alcoholic Beverage Defined. Bus. & Prof. Code, § 23004.
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f).
- Knowledge of Age Not an Element. *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906].
- Good Faith Belief Person at Least 21 Defense. *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906].
- Bona Fide Evidence of Age Defense. Bus. & Prof. Code, § 25660(c); *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899 [73 Cal.Rptr. 352].
- Affirmative Defenses. See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

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RELATED ISSUES

See the Related Issues section of CALCRIM No. 2962, *Selling or Furnishing Alcoholic Beverage to Person Under 21*.

(Revised August 2006)

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2965. Parent Permitting Child to Consume Alcoholic Beverage: Causing Traffic Collision

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The defendant is charged [in Count ____] with permitting a child to consume an alcoholic beverage at (his/her) home.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was the (parent/guardian) of** _____ *<insert name of defendant's child>***;**
2. **The defendant permitted** _____ *<insert name of defendant's child>* **[or** _____**,** *<insert name of other person under 18 years old>* **who was in the company of** _____ *<insert name of defendant's child>***, or both,] to (consume an alcoholic beverage/ [or] use** _____ *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance,) in the defendant's home;**
3. _____ *<insert name of defendant's child>* **[and** _____ *<insert name of other person under 18 years old>***] (was/ were) under 18 years old at the time;**
4. **The defendant knew that (he/she) was permitting** _____ *<insert name of defendant's child>* **[or** _____ *<insert name of other person under 18 years old>***, or both,] to (consume an alcoholic beverage/ [or] use** _____ *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance,) in the defendant's home;**
5. **As a result of (consuming the alcoholic beverage/ [or] using the controlled substance),** _____ *<insert name of defendant's child or other person under 18 years old>* **(had a blood-alcohol concentration of 0.05 percent or greater, as measured by a chemical test[,]/ [or] was under the influence of a controlled substance);**
6. **The defendant allowed** _____ *<insert name of defendant's child or other person under 18 years old>* **to drive a vehicle after leaving the defendant's home;**
7. **The defendant knew that (he/she) was allowing** _____ *<insert name of defendant's child or other person under 18*

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years old> **to drive a vehicle after leaving the defendant's home;**

AND

8. _____ <*insert name of defendant's child or other person under 18 years old*> **caused a traffic collision while driving the vehicle.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer*>**.]**

An act causes a traffic collision if the collision is the direct, natural, and probable consequence of the act and the collision would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

<*Defense: Good Faith Belief at Least 18*>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person under 18*> **was at least 18 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that** _____ <*insert name of person under 18*> **was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

[There may be more than one cause of a traffic collision. An act causes a collision only if it is a substantial factor in causing the collision. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the collision.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[In evaluating the test results in this case, you may consider whether or not the person administering the test or the agency

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maintaining the testing device followed the regulations of the California Department of Health Services.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If there is evidence of multiple causes of the collision, the court should also give bracketed paragraph on causation that begins with "There may be more than one cause of a traffic collision." (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed that begins with "In evaluating (the/any) test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr.3d 542] [failure to follow regulations in administering breath test goes to weight, not admissibility, of evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Subdivision (a)(2) of Business and Professions Code section 25658.2 only contemplates a "parent" as a defendant, whereas the other subdivisions include both "parent" as well as "legal guardian." The committee concluded that this omission, as well as the typographical error in subdivision (a) of the statute, are inadvertent and has therefore included both options. If the court disagrees, it must revise the language of element 1 accordingly.

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Defenses—Instructional Duty

In *In re Jennings* (2004) 34 Cal.4th 254, 280 [17 Cal.Rptr.3d 645, 95 P.3d 906], the Supreme Court held that, for a prosecution under Business and Professions Code section 25658(a), the defendant may assert as a defense a good faith belief that the person was at least 21. If the trial court concludes that this defense also applies to a prosecution under Business and Professions Code section 25658.2, and there is sufficient evidence that the defendant had a good faith belief that the "other person under 18" with the defendant's child was actually over 18, the court has a **sua sponte** duty to instruct on the defense. The court may use the bracketed language to instruct on this defense, if appropriate.

AUTHORITY

- Elements. Bus. & Prof. Code, § 25658.2.
- Alcoholic Beverage Defined. Bus. & Prof. Code, § 23004.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2962, *Selling or Furnishing Alcoholic Beverage to Person Under 21.*

(New January 2006)

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2966. Disorderly Conduct: Under the Influence in Public

The defendant is charged [in Count ____] with being under the influence of (alcohol/ [and/or] a drug) in public.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was willfully under the influence of (alcohol[,]/ [and/or] a drug[,]/ [and/or] a controlled substance[,]/ [and/or] toluene);**
2. **When the defendant was under the influence, (he/she) was in a public place;**

AND

<Alternative 3A—unable to care for self>

[3. The defendant was unable to exercise care for (his/her) own safety [or the safety of others].]

<Alternative 3B—obstructed public way>

[3. Because the defendant was under the influence, (he/she) interfered with, obstructed, or prevented the free use of a street, sidewalk, or other public way.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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AUTHORITY

- Elements. Pen. Code, § 647(f).
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338].
- Statute Constitutional. *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1119–1121 [232 Cal.Rptr. 814, 729 P.2d 80]; *In re Joseph G.* (1970) 7 Cal.App.3d 695, 703–704 [87 Cal.Rptr. 25]; *In re Spinks* (1967) 253 Cal.App.2d 748, 752 [61 Cal.Rptr. 743].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 55–58.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.20 (Matthew Bender).

RELATED ISSUES

Defendant in Parked Car

In *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660], the court held that the defendant was in a public place when he was found sitting in a parked car on a public street.

(New January 2006)

2967–2979. Reserved for Future Use

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F. OFFENSES INVOLVING CARE OF MINOR

2980. Contributing to Delinquency of Minor

The defendant is charged [in Count ____] with contributing to the delinquency of a minor.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative A—caused or encouraged minor to come under jurisdiction of juvenile court>

[1. The defendant (committed an act/ [or] failed to perform a duty);

AND

2. In (doing so/ [or] failing to do so)[,] the defendant (caused[,]/ [or] encouraged[,]/ [or] contributed to (causing/ [or] encouraging)) a minor to become [or continue to be] a (dependent /delinquent) child of the juvenile court.]

<Alternative B—induced minor to come or remain under jurisdiction of juvenile court or not to follow court order>

[The defendant by (act[,]/ [or] failure to act[,]/ [or] threat[,]/ [or] command[,]/ [or] persuasion) induced or tried to induce a (minor/delinquent child of the juvenile court/dependent child of the juvenile court) to do either of the following:

1. Fail or refuse to conform to a lawful order of the juvenile court;

OR

2. (Do any act/Follow any course of conduct/Live in a way) that would cause or obviously tend to cause that person to become or remain a (dependent /delinquent) child of the juvenile court.]

In order to commit this crime, a person must act with [either] (general criminal intent/ [or] criminal negligence).

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[In order to act with *general criminal intent,* a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally or on purpose. However, it is not required that he or she intend to break the law.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

A *minor* is a person under 18 years old.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[A parent [or legal guardian] has a duty to exercise reasonable care, supervision, protection, and control over his or her minor child.]

[A *guardian* means the legal guardian of a child.]

<A. Dependent Child Defined: Physical Abuse>

[A minor may become a *dependent child* if his or her parent [or guardian] has intentionally inflicted serious physical harm on him or her, or there is a substantial risk that the parent [or guardian] will do so.

[The manner in which a less serious injury, if any, was inflicted, any history of repeated infliction of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian may be relevant to whether the child is at substantial risk of serious physical harm.]

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[*Serious physical harm* does not include reasonable and age-appropriate spanking of the buttocks when there is no evidence of serious physical injury.]]

<B. Dependent Child Defined: Neglect>

[A minor may become a *dependent child* if he or she has suffered, or is at substantial risk of suffering, serious physical harm or illness as a result of [one of the following]:

[1.] [The failure or inability of his or her parent [or guardian] to adequately supervise or protect the child(;/.)]

[OR]

[(1/2).] [The willful or negligent failure of his or her parent [or guardian] to provide the child with adequate food, clothing, shelter, or medical treatment(;/.)]

[OR]

[(1/2/3).] [The inability of his or her parent [or guardian] to provide regular care for the child due to the parent's [or guardian's] (mental illness[,]/ [or] developmental disability[,]/ [or] substance abuse).]

[A minor cannot become a dependent child based only on the fact that there is a lack of emergency shelter for the minor's family.]

[Deference must be given to a parent's [or guardian's] decision to give medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by one of its accredited practitioners. A minor cannot be found to be a dependent child unless such a finding is necessary to protect the minor from suffering serious physical harm or illness. The following factors may bear on such a determination:

1. **The nature of the treatment proposed by the parent [or guardian];**
2. **The risks, if any, to the child posed by the course of treatment or nontreatment proposed by the parent [or guardian];**

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3. The risks, if any, of any alternative course of treatment being proposed for the child by someone other than the parent [or guardian];

AND

4. The likely success of the course of treatment or nontreatment proposed by the parent [or guardian].]

[A minor may be a dependent child only as long as necessary to protect him or her from the risk of suffering serious physical harm or illness.]]

<C. Dependent Child Defined: Serious Emotional Damage>

[A minor may become a *dependent child* if (his or her parent's [or guardian's] conduct[,]/ [or] the lack of a parent [or guardian] who is capable of providing appropriate care[,]) has caused the minor to suffer serious emotional damage or to face a substantial risk of suffering serious emotional damage. *Serious emotional damage* may be shown by severe anxiety, depression, withdrawal, or unruly, aggressive behavior toward himself, herself, or others. [However, a minor cannot become a *dependent child* on this basis if the parent [or guardian] willfully fails to provide mental health treatment to the minor based on a sincerely held religious belief and a less-intrusive intervention is available.]]

<D. Dependent Child Defined: Sexually Abused>

[A minor may become a *dependent child* if he or she:

1. Has been sexually abused;

2. Faces a substantial risk of being sexually abused by (his or her (parent/ [or] guardian)/ [or] a member of his or her household);

OR

3. Has a parent [or guardian] who has failed to adequately protect him or her from sexual abuse when the parent [or guardian] knew or reasonably should have known that the child was in danger of sexual abuse.]

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<E. Dependent Child Defined: Severe Physical Abuse Under Age Five>

[A minor may become a *dependent child* if he or she is under five years old and has suffered severe physical abuse by a parent or by any person known by the parent if the parent knew or reasonably should have known that the person was physically abusing the child.

As used here, the term *severe physical abuse* means any of the following:

1. **A single act of abuse that causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death;**
2. **A single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling;**
3. **More than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness;**

OR

4. **The willful, prolonged failure to provide adequate food.]**

<F. Dependent Child Defined: Parent or Guardian Caused Death>

[A minor may become a *dependent child* if his or her parent [or guardian] caused the death of another child through abuse or neglect.]

<G. Dependent Child Defined: Left Without Support>

[A minor may become a *dependent child* if he or she has been left without any provision for support.]

[A minor may become a *dependent child* if he or she has been voluntarily surrendered according to law and has not been reclaimed within the 14-day period following that surrender.]

[A minor may become a *dependent child* if his or her parent [or guardian] has been incarcerated or institutionalized and cannot arrange for the child's care.]

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[A minor may become a *dependent child* if his or her relative or other adult custodian with whom he or she resides or has been left is unwilling or unable to provide care or support for the child, the parent's whereabouts are unknown, and reasonable efforts to locate the parent have been unsuccessful.]

<H. Dependent Child Defined: Freed for Adoption>

[A minor may become a *dependent child* if he or she has been freed for adoption by one or both parents for 12 months by either relinquishment or termination of parental rights, or an adoption petition has not been granted.]

<I. Dependent Child Defined: Acts of Cruelty>

[A minor may become a *dependent child* if he or she has been subjected to an act or acts of cruelty by (his or her (parent/ [or] guardian)/ [or] a member of his or her household), or the parent [or guardian] has failed to adequately protect the child from an act or acts of cruelty when the parent [or guardian] knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.]

<J. Dependent Child Defined: Sibling Abused>

[A minor may become a *dependent child* if his or her sibling has been abused or neglected, as explained above, and there is a substantial risk that the child will be abused or neglected in the same way. The circumstances surrounding the abuse or neglect of the sibling, the mental condition of the parent [or guardian], and other factors may bear on whether there is a substantial risk to the child.]

<Delinquent Child Defined>

[A *delinquent child* is a minor whom a court has found to have committed a crime.]

[A *delinquent child* is [also] a minor who has violated a curfew based solely on age.]

[A *delinquent child* is [also] a minor who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parent [or guardian or custodian], or who is beyond the control of that person.]

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[A *delinquent child* is [also] a minor who _____ <*insert other grounds for delinquency from Welf. & Inst. Code, § 601*>.]

<Sexual Abuse Defined>

[*Sexual abuse* includes (rape[,]/ [and] statutory rape[,]/ [and] rape in concert[,]/ [and] incest[,]/ [and] sodomy[,]/ [and] lewd or lascivious acts on a child[,]/ [and] oral copulation[,]/ [and] sexual penetration [,]/ [and] child molestation[,]/ [and] employing a minor to perform obscene acts[,]/ [and] preparing, selling, or distributing obscene matter depicting a minor).

To decide whether the (parent/guardian/_____ <*insert description of person alleged to have committed abuse*> committed (that/one of those) crime[s], please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

[*Sexual abuse* also includes, but is not limited to, the following:

- **[Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not semen is emitted(;/.)]**
- **[Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person(;/.)]**
- **[Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose[, unless it is done for a valid medical purpose](;/.)]**
- **[The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks), or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification(;/.) [However, *sexual abuse* does not include touching that may be reasonably construed as normal caretaker responsibilities, interactions with, or demonstrations of affection for the child, or acts performed for a valid medical purpose(;/.)]]**
- **[The intentional masturbation of the perpetrator's genitals in the child's presence(;/.)]**

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- **[Conduct by (someone who knows that he or she is aiding, assisting, employing, using, persuading, inducing, or coercing/a person responsible for a child's welfare who knows that he or she is permitting or encouraging) a child to engage in[, or assist others to engage in,] (prostitution[,]/ [or] a live performance involving obscene sexual conduct[,]/ [or] posing or modeling, alone or with others, for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction involving obscene sexual conduct)(;/.) [A *person responsible for a child's welfare* is a (parent[,]/ [or] guardian[,]/ [or] foster parent[,]/ [or] licensed administrator or employee of a public or private residential home, residential school, or other residential institution)(;/.)]]**
- **[Photographing, developing, duplicating, printing, depicting, or exchanging, any film, photograph, videotape, negative, or slide knowing that it shows a child engaged in an act of obscene sexual conduct. [However, *sexual abuse* does not include (conduct by a person engaged in legitimate medical, scientific, or educational activities[;]/ [or] lawful conduct between spouses[;]/ conduct by a person engaged in law enforcement activities[;]/ [or] conduct by an employee engaged in work for a commercial film developer while acting within the scope of his or her employment and as instructed by his or her employer, provided that the employee has no financial interest in the commercial developer who employs him or her).]]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If more than one act is alleged as a basis for the charge, the court has a **sua sponte** duty to give a unanimity instruction. (*People v. Madden* (1981) 116 Cal.App.3d 212, 215–216 [171 Cal.Rptr. 897].) Give CALCRIM No.

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3500, *Unanimity*. A unanimity instruction is not required if the acts "constitute a continuing course of conduct." *(Ibid.)* See the discussion in the Bench Notes for CALCRIM No. 3500. (See also *People v. Schoonderwood* (1945) 72 Cal.App.2d 125, 127 [164 P.2d 69] [continuous course of conduct exception applied to charge of contributing to delinquency of a minor]; *People v. Dutra* (1946) 75 Cal.App.2d 311, 321–322 [171 P.2d 41] [exception did not apply].)

If the case involves allegations of child molestation and the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the court should determine whether it is more appropriate to give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) See discussion in the Related Issues section of CALCRIM No. 3500, *Unanimity*.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

The remaining bracketed paragraphs should be given on request if relevant.

AUTHORITY

- Elements and Definitions. Pen. Code, § 272.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Sexual Abuse Defined. Pen. Code, § 11165.1.
- Delinquent/Ward of Court Defined. Welf. & Inst. Code, §§ 601–602.
- Dependent Child Defined. Welf. & Inst. Code, § 300.
- Minor Defined. Pen. Code, § 270e; Fam. Code, § 6500.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 153.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.20[8], Ch. 144, *Crimes Against Order,* § 144.10[1] (Matthew Bender).

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RELATED ISSUES

Lesser Offense of Rape or Lewd Acts

There is disagreement regarding whether a violation of Penal Code section 272 is a necessarily lesser included offense of rape or lewd and lascivious acts. The Supreme Court concluded that it was in *People v. Greer* (1947) 30 Cal.2d 589, 597–598 [184 P.2d 512], overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6 [52 Cal.Rptr.2d 282, 914 P.2d 832]. However, in *People v. Bobb* (1989) 207 Cal.App.3d 88, 92 [254 Cal.Rptr. 707], disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531], the Court of Appeal expressly declined to follow *Greer*, concluding that "the calculus has been altered" by an intervening amendment to Welfare and Institutions Code section 601 and further faulting *Greer* for failing to analyze the elements of the lesser included offenses.

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2981. Failure to Provide

The defendant is charged [in Count ____] with failing to provide for (his/her) (child/children).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was the parent of _____ <*insert name[s] of child or children*>;**
2. **_____ <*insert name[s] of child or children*> (was/were) [a] minor[s];**
3. **The defendant failed to provide necessities for _____ <*insert name[s] of child or children*>;**

AND

4. **The failure to provide was willful and without lawful excuse.**

A *minor* is a person under 18 years old.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

***Necessities* are necessary clothing, food, shelter, [and] medical care[, or other remedial care] for a minor child.**

[*Other remedial care* includes spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination and by one of its duly accredited practitioners.]

[A parent must do all that is reasonable in order to provide necessities for minor children. A parent has a *lawful excuse* for failing to do so if, through no fault of his or her own, he or she is unable to earn enough money and does not have other income or assets to pay for those necessities. [It is not a *lawful excuse* if the parent is unable to provide necessities because he or she has unreasonably chosen to spend money on other things or has failed to diligently seek work.]]

[When you decide whether the defendant was able to provide necessities for _____ <*insert name[s] of child or children*>,

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consider all of (his/her) income, including social insurance benefits and gifts.]

[A parent must provide necessities for a minor child even if he or she never married or is divorced from the child's other parent. This duty also exists regardless of any court order for alimony or child support in a divorce action.]

[It is not a *lawful excuse* that the other parent has legal custody of the minor child or that the other parent, another person, or an organization voluntarily or involuntarily has provided necessities for the minor child or undertaken to do so.]

[If the People prove beyond a reasonable doubt that the defendant knew of _____'s <*insert name[s] of child or children*> **existence and either:**

1. **Abandoned or deserted _____** <*insert name[s] of child or children*>**,**

OR

2. **Failed to provide _____** <*insert name[s] of child or children*> **with necessities,**

then you may but are not required to conclude that the defendant's failure to provide was willful and without lawful excuse.]

[The husband of a woman who bears a child as a result of artificial insemination is the father of that child if he consented in writing to the artificial insemination.]

[If the People prove beyond a reasonable doubt that:

1. **_____** <*insert name[s] of child or children*> **(was/were) born while the defendant's wife was cohabiting with him,**

AND

2. **The defendant is neither impotent nor sterile,**

then you may but are not required to conclude that the defendant is _____'s <*insert name[s] of child or children*> **father.]**

[The People have the burden of proving beyond a reasonable doubt that the defendant is the parent of _____ <*insert*

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name[s] of child or children>. **If the People have not met this burden, you must find the defendant not guilty of this crime.]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[An unborn child is considered a minor for whom a parent must provide necessities.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The bracketed paragraphs that begin with "If the People prove beyond a reasonable doubt that" explain rebuttable presumptions created by statute. (See Pen. Code, § 270; Fam. Code, § 7540; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, these paragraphs of the instruction have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." (Evid. Code, § 604.)

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that the defendant knew of _____'s <*insert name[s] of child or children*> existence" if there is evidence that the defendant either did not know of the child's existence or did not act willfully or without a lawful excuse.

In addition, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that: 1. _____ <*insert name[s] of child or children*> (was/were) born while the defendant's wife was cohabiting with him" if there is evidence that the defendant is not the child's father.

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If there is evidence that the defendant is not the child's parent, give the bracketed paragraph that begins with "The People have the burden of proving beyond a reasonable that the defendant is the parent."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

The remaining bracketed paragraphs should be given on request if supported by the evidence.

AUTHORITY

- Elements and Definitions. Pen. Code, § 270.
- Willfully Defined. Pen. Code, § 7(1).
- Minor Defined. Pen. Code, § 270e; Fam. Code, § 6500.
- Inability as Excuse. *People v. Wallach* (1923) 62 Cal.App. 385, 391 [217 P. 81].
- Must Do All Reasonable. *People v. Caseri* (1933) 129 Cal.App. 88, 91–92 [18 P.2d 389].
- Parentage Through Artificial Insemination Defined. Fam. Code, § 7613.
- Presumption and Inference Defined. Evid. Code, § 600.
- Permissive Inference of Parentage. Fam. Code, § 7540; *People v. Roder* (1983) 33 Cal.3d 491, 506–507 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Evidentiary Presumptions. Evid. Code, §§ 602–604.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 143.

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2982. Persuading, Luring, or Transporting a Minor Under 14 Years of Age

The defendant is charged [in Count ____] with persuading, luring, or transporting a minor who is under 14 years of age.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant contacted or communicated with _____ <*insert name of minor*>;**
2. **When the defendant did so, (he/she) was an adult stranger to the minor;**
3. **_____ <*insert name of minor*> was under 14 years of age at the time;**
4. **The defendant knew that (he/she) was contacting or communicating with _____ <*insert name of minor*>;**
5. **The defendant knew or reasonably should have known that _____ <*insert name of minor*> was under 14 years of age at the time;**
6. **The defendant contacted or communicated with _____ <*insert name of minor*> with the intent to persuade, lure, or transport[, or attempt to persuade, lure, or transport,] (him/her), for any purpose, away from (_____'s <*insert name of minor*> home/ [or] any location known by _____'s <*insert name of minor*> parent[, legal guardian, or custodian] as a place where the child is located);**
7. **The defendant did not have the express consent of _____'s <*insert name of minor*> parent [or legal guardian];**

[AND]

8. **When the defendant acted, (he/she) intended to avoid the consent of _____'s <*insert name of minor*> parent [or legal guardian](;/.)**

<Give element 9 when instructing on an emergency situation.>

[AND

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9. The defendant was not acting in an emergency situation.]

An *adult stranger* is a person at least 21 years old who has no substantial relationship with the child or is merely a casual acquaintance, or who has established or promoted a relationship with the child for the primary purpose of victimization.

***Express consent* means oral or written permission that is positive, direct, and unequivocal, requiring no inference or implication to supply its meaning.**

[*Contact* or *communication* includes the use of a telephone or the Internet.]

[*Internet* means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this definition.]

[An *emergency situation* is a situation where a child is threatened with imminent bodily, emotional, or psychological harm.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of an "emergency situation." (Pen. Code, § 272(b)(2).) Give element 9 and the definition of "emergency situation."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; In re Harris (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

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The remaining bracketed paragraphs should be given on request as appropriate.

Note that the Penal Code section 272 was amended by Stats. 2005, ch. 461 (AB33) to change the victim's age to "under 14 years of age." Prosecutions based on conduct that occurred before January 1, 2006 should use the former age requirement of "twelve years old or younger."

AUTHORITY

- Elements and Definitions. Pen. Code, § 272(b)(1).
- Internet Defined. Bus. & Prof. Code, § 17538(f)(6).
- Victimization as Predatory Sexual Conduct. Welf. & Inst. Code, § 6600(e).
- Minor Defined. Pen. Code, § 270e; Fam. Code, § 6500.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 153.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.10[3] (Matthew Bender).

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G. BETTING

2990. Bookmaking

The defendant is charged [in Count ____] with bookmaking.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant engaged in bookmaking;**

AND

2. **When the defendant acted, (he/she) knew that (he/she) was engaging in bookmaking.**

***Bookmaking* includes the taking of bets, either orally or recorded in writing. The defendant does not need to be involved in betting as a business or occupation. The taking of one bet is sufficient.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something of value). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ <*insert description of event from Pen. Code, § 337a*>.] [It is not necessary that the event that was bet on actually take place.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(1); *People v. Burch* (1953) 118 Cal.App.2d 122, 124 [257 P.2d 44]; *People v. Ghio* (1927) 82 Cal.App. 28, 32–33 [255 P. 205].

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- Knowledge Required. *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- Bookmaking Defined. *People v. Thompson* (1962) 206 Cal.App.2d 734, 739 [24 Cal.Rptr. 101]; *People v. Fontes* (1970) 7 Cal.App.3d 650, 653–654 [86 Cal.Rptr. 790]; *People v. Bradford* (1949) 95 Cal.App.2d 372, 377–378 [213 P.2d 37].
- Bet Defined. *People v. Oreck* (1946) 74 Cal.App.2d 215, 220 [168 P.2d 186].
- Writing Not Required. Pen. Code, § 337a(a)(1); *People v. Burch* (1953) 118 Cal.App.2d 122, 124 [257 P.2d 44].
- One Bet Sufficient. *People v. Buckman* (1960) 186 Cal.App.2d 38, 50 [8 Cal.Rptr. 765].
- Event Need Not Occur. *People v. Ghio* (1927) 82 Cal.App. 28, 32–33 [255 P. 205].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 278.

COMMENTARY

As a result of statutory amendments, the committee believes that there is no longer a distinction between the elements of this crime and the offense of accepting a bet. (Pen. Code § 337a(a)(6); see CALCRIM No. 2996, *Betting or Wagering*.)

RELATED ISSUES

Cash Not Required

A bet does not require that the defendant receive cash. (*People v. Raze* (1949) 91 Cal.App.2d 918, 922 [205 P.2d 1062].) It is sufficient if the defendant received something of value equivalent to money. *(Ibid.)*

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2991. Pool Selling

The defendant is charged [in Count ____] with pool selling.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant sold or distributed shares or chances in a betting pool;**

AND

2. **When (he/she) acted, the defendant knew that (he/she) was selling or distributing shares or chances in a betting pool.**

The defendant does not need to be involved in selling or distributing shares or chances as a business or occupation. A single act that violates the statute is sufficient. [It is not necessary that the event that is the subject of a betting pool actually take place.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(1); *Finster v. Keller* (1971) 18 Cal.App.3d 836, 846 [96 Cal.Rptr. 241].
- Knowledge Required. *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- Pool Selling Defined. *Finster v. Keller* (1971) 18 Cal.App.3d 836, 846 [96 Cal.Rptr. 2421]; *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- One Bet Sufficient. Pen. Code, § 337a(a)(1).
- Event Need Not Occur. *People v. Ghio* (1927) 82 Cal.App. 28, 32–33 [255 P. 205].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 279.

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2992. Keeping a Place for Recording Bets

The defendant is charged [in Count ____] with keeping a place for the purpose of recording [or registering] bets or shares in a betting pool.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant kept or occupied a place for any period of time;**
2. **The defendant kept or occupied the place for the purpose of recording [or registering] bets or shares in a betting pool;**
3. **The place contained [(a/an)] (book[,]/ [or] paper[,]/ [or] apparatus[,]/ [or] device[,]/ [or] paraphernalia) to record [or register] bets or shares in a betting pool;**

AND

4. **The defendant possessed the (book[,]/ [or] paper[,]/ [or] apparatus[,]/ [or] device[,]/ [or] paraphernalia) for the purpose of recording [or registering] bets or shares in a betting pool.**

As used here, a *place* means the whole or part of any (room[,]/ [or] building[,]/ [or] stand[,]/ [or] shed[,]/ [or] tenement[,]/ [or] tent[,]/ [or] booth[,]/ [or] float[,]/ [or] vessel[,]/ [or] vehicle[,]/ [or] enclosure) of any kind.

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something of value). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ <*insert description of event from Pen. Code, § 337a*>.] [It is not necessary that the event that was bet on actually take place.]

***Recording* [or registering] a bet means making a notation on paper, or using any other material or device, to allow winnings on the bet to be distributed in the future. [*Recording* [or**

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registering] a bet does not require the type of registering or recording that occurs in a legitimate business establishment.]

[It is not required that any bets actually be made.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(2); *Finster v. Keller* (1971) 18 Cal.App.3d 836, 847–848 [96 Cal.Rptr. 241]; *People v. Cuda* (1960) 178 Cal.App.2d 397, 414 [3 Cal.Rptr. 86].
- Place Applies to Vehicle. *People v. Roche* (1945) 68 Cal.App.2d 665, 669–670 [157 P.2d 440].
- Bet Defined. *People v. Oreck* (1946) 74 Cal.App.2d 215, 220 [168 P.2d 186].
- Actual Bet Not Required. *People v. Cuda* (1960) 178 Cal.App.2d 397, 414 [3 Cal.Rptr. 86].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 280.

RELATED ISSUES

Ownership Not Required

Test is occupancy, rather than ownership, of the premises for the illegal purposes. (*People v. Reyes* (1976) 62 Cal.App.3d 53, 69 [132 Cal.Rptr. 848].)

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2993. Receiving or Holding Bets

The defendant is charged [in Count ____] with (receiving[,]/ [or] holding[,]/ [or] forwarding) bets.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (received[,]/ [or] held[,]/ [or] forwarded) money [or something valuable];**

AND

2. **The defendant knew that it was given to (him/her) as a bet.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something of value). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ <*insert description of event from Pen. Code, § 337a*>.] [It is not necessary that the event that was bet on actually take place.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(3); *People v. Gaspard* (1960) 177 Cal.App.2d 487, 488 [2 Cal.Rptr. 193].
- Must Receive Money or Thing of Value. *People v. Gaspard* (1960) 177 Cal.App.2d 487, 488 [2 Cal.Rptr. 193]; *People v. Chavez* (1950) 100 Cal.App.2d 356, 359 [223 P.2d 663].
- Bet Defined. *People v. Oreck* (1946) 74 Cal.App.2d 215, 220 [168 P.2d 186].

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- Event Need Not Occur. *People v. Chavez* (1950) 100 Cal.App.2d 356, 359 [223 P.2d 663].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 281.

RELATED ISSUES

Cash Not Required

A bet does not require that the defendant receive cash. (*People v. Raze* (1949) 91 Cal.App.2d 918, 922 [205 P.2d 1062].) It is sufficient if the defendant received something of value equivalent to money. *(Ibid.)*

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2994. Recording Bets

The defendant is charged [in Count ____] with recording [or registering] a bet.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant recorded [or registered] a bet;**

AND

2. **When the defendant acted, (he/she) knew that (he/she) was recording or registering a bet.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something of value). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ <*insert description of event from Pen. Code, § 337a*>.] [It is not necessary that the event that was bet on actually take place.]

***Recording* [or registering] a bet means making a notation on paper, or using any other material or device, to allow winnings on the bet to be distributed in the future. [*Recording* [or registering] a bet does not require the type of registering or recording that occurs in a legitimate business establishment.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(4); *People v. Allen* (1953) 115 Cal.App.2d 745, 747 [252 P.2d 968].

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- Knowledge Required. See *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- Bet Defined. *People v. Oreck* (1946) 74 Cal.App.2d 215, 220 [168 P.2d 186].
- Event Need Not Occur. *People v. Warnick* (1948) 86 Cal.App.2d 900, 902 [195 P.2d 552].
- Recording a Bet. *People v. Ross* (1950) 100 Cal.App.2d 116, 121 [223 P.2d 85].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 281.

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2995. Permitting Place to Be Used for Betting Activities

The defendant is charged [in Count ____] with permitting a place to be used for betting activities.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant owned, rented, or occupied a place;**
2. **The defendant allowed the place to be used for (bookmaking[,]/ [or] pool selling[,]/ [or] recording [or registering] bets[,]/ [or] receiving, holding, or forwarding bets);**

AND

3. **The defendant knew that the place was being used for that purpose.**

As used here, a *place* means the whole or part of any (room[,]/ [or] building[,]/ [or] stand[,]/ [or] shed[,]/ [or] tenement[,]/ [or] tent[,]/ [or] booth[,]/ [or] float[,]/ [or] vessel[,]/ [or] vehicle[,]/ [or] enclosure) of any kind.

[*Bookmaking* includes the taking of bets, either orally or recorded in writing. The defendant does not need to be involved in betting as a business or occupation. The taking of one bet is sufficient.]

[*Pool selling* means selling or distributing shares or chances in a betting pool. The defendant does not need to be involved in selling or distributing shares or chances as a business or occupation. A single act that violates the statute is sufficient. [It is not necessary that the event that is the subject of a betting pool actually take place.]]

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something of value). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ <*insert description of event from Pen. Code, § 337a*>.] [It is not necessary that the event that was bet on actually take place.]

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[*Recording* [or registering] a bet means making a notation on paper, or using any other material or device, to allow winnings on the bet to be distributed in the future. [*Recording* [or registering] a bet does not require the type of registering or recording that occurs in a legitimate business establishment.]]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(5).
- Knowledge Required. See *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- "Place" Applies to Vehicle. *People v. Roche* (1945) 68 Cal.App.2d 665, 669–670 [157 P.2d 440].
- Bookmaking Defined. *People v. Thompson* (1962) 206 Cal.App.2d 734, 739 [24 Cal.Rptr. 101]; *People v. Fontes* (1970) 7 Cal.App.3d 650, 653–654 [86 Cal.Rptr. 760]; *People v. Bradford* (1949) 95 Cal.App.2d 372, 377–378 [213 P.2d 37].
- Pool Selling Defined. *Finster v. Keller* (1971) 18 Cal.App.3d 836, 846 [96 Cal.Rptr. 241]; *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- Bet Defined. *People v. Oreck* (1946) 74 Cal.App.2d 215, 220 [168 P.2d 186].
- Writing Not Required. Pen. Code, § 337a(a)(1); *People v. Burch* (1953) 118 Cal.App.2d 122, 124 [257 P.2d 44].
- One Bet Sufficient. *People v. Buckman* (1960) 186 Cal.App.2d 38, 50 [8 Cal.Rptr. 765].
- Event Need Not Occur. *People v. Ghio* (1927) 82 Cal.App. 28, 32–33 [255 P. 205].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 280.

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2996. Betting or Wagering

The defendant is charged [in Count ____] with (making[,]/ [or] offering[,]/ or accepting) a bet.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (made[,]/ [or] offered[,]/ or accepted) a bet;**

AND

2. **The defendant knew that (he/she) was (making[,]/ [or] offering[,]/ or accepting) a bet.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something of value). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ <*insert description of event from Pen. Code, § 337a*>.] [It is not necessary that the event that was bet on actually take place.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 337a(a)(6).
- Knowledge Required. See *People v. Coppla* (1950) 100 Cal.App.2d 766, 768 [224 P.2d 828].
- Bet Defined. *People v. Oreck* (1946) 74 Cal.App.2d 215, 220 [168 P.2d 186].
- Event Need Not Occur. *People v. Ghio* (1927) 82 Cal.App. 28, 32–33 [255 P.205].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 281.

RELATED ISSUES

Cash Not Required

A bet does not require that the defendant receive cash. (*People v. Raze* (1949) 91 Cal.App.2d 918, 922 [205 P.2d 1062].) It is sufficient if the defendant received something of value equivalent to money. *(Ibid.)*

(New January 2006)

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3250. Enhancement, Sentencing Factor, or Specific Factual Issue: Template

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J. RELATED INSTRUCTIONS

3260. Duty of Jury: Verdict Form for Enhancement, Sentencing Factor, or Prior Conviction

3261. During Commission of Felony: Defined—Escape Rule

3262–3399. Reserved for Future Use

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A. PRIOR CONVICTION

3100. Prior Conviction: Nonbifurcated Trial

If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <*insert number[s] or description[s] of exhibit[s]*>**. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <*insert code section alleged*>**, on** _____ <*insert date of conviction*>**, in the** _____ <*insert name of court*>**, in Case Number** _____ <*insert docket or case number*>**(;/.)**

[AND <*Repeat for each prior conviction alleged*>**.]**

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing credibility of the defendant*>**]. Do not consider this evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose.]**

[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. Give this instruction if the

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defendant does not admit the prior conviction and the court has not granted a bifurcated trial on the prior conviction.

If identity is an issue, the court must make the factual determination that the defendant is the person who has suffered the convictions in question before giving this instruction.

If the court grants bifurcation, do not give this instruction. Give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary below discusses these issues further. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103, *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary below discusses this issue further.

On request, the court should give the limiting instruction that begins with "Consider the evidence presented on this allegation only when deciding. . . ." (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may request that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate whether the prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Statutory Authority. Pen. Code, §§ 1025, 1158.
- Bifurcation. *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines Whether Defendant Is Person Named in Documents. Pen. Code, § 1025(c); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].

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- Limiting Instruction on Prior Conviction. See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Disputed Factual Issues. See *People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *People v. McGee* (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474 [9 Cal.Rptr.3d 586]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901].
- Three-Strikes Statutes. Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony. Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony. Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior. Pen. Code, § 667.5(b).
- Serious Felony Defined. Pen. Code, § 1192(c).
- Violent Felony Defined. Pen. Code, § 667.5(c).

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 515.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

COMMENTARY

Factual Issues—Decided by Jury or Court?

A prior conviction may present an ancillary factual issue that must be decided before the conviction may be used under a particular enhancement or sentencing statute. For example, the prosecution might seek sentencing under the "three strikes" law, alleging that the defendant was previously convicted of two burglaries. These prior convictions would qualify as

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"strikes" only if the burglaries were residential. (See *People v. Kelii* (1999) 21 Cal.4th 452, 455 [87 Cal.Rptr.2d 674, 981 P.2d 518].) If the defendant had been specifically convicted of first degree burglary of an inhabited dwelling, then there would be no issue over whether the prior convictions qualified. If, on the other hand, the defendant had been convicted simply of "burglary," then whether the offenses were residential would be a factual issue. *(Ibid.)* The question then arises: who decides these ancillary factual issues, the jury or the court?

Penal Code sections 1025(b) and 1158 specifically state that the jury must decide whether the defendant "suffered the prior conviction." The California Supreme Court has observed that "sections 1025 and 1158 are limited in nature. [Citation.] By their terms, [these sections] grant a defendant the right to have the jury determine only whether he or she 'suffered' the alleged prior conviction." (*People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2] [internal quotation marks and citation omitted].) Thus, the California Supreme Court has held that the court, not the jury, must decide ancillary facts necessary to establish that a prior conviction comes within a particular recidivist statute. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541].) Specifically, the court must determine whether the facts of a prior conviction make the conviction a "serious" felony (*People v. Kelii, supra,* 21 Cal.4th at p. 457); and whether prior convictions charged as serious felonies were "brought and tried separately." (*People v. Wiley, supra,* 9 Cal.4th at p. 592.)

Penal Code section 1025 was amended in 1997 to further provide that the court, not the jury, must determine whether the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps, supra,* 25 Cal.4th at pp. 24–25.) The California Supreme Court has held that the defendant still has a statutory right to a jury trial on whether he or she "suffered" the prior conviction, which "may include the question whether the alleged prior conviction *ever even occurred*. For example, in a rare case, the records of the prior conviction may have been fabricated, or they may be in error, or they may otherwise be insufficient to establish the existence of the prior conviction." (*People v. Epps, supra,* 25 Cal.4th at p. 25 [italics in original].) At the same time, the court also observed that "[t]his procedure would appear to leave the jury little to do except to determine whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged." (*Id.* at p. 27 [italics omitted] [quoting *People v. Kelii, supra,* 21 Cal.4th at p. 459].)

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However, in 2000, the United States Supreme Court held that the federal due process clause requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; see also *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].) In *People v. Epps, supra,* 25 Cal.4th at p. 28, the California Supreme Court noted that *Apprendi* might have overruled the holdings of *Kelii* and *Wiley*. Not confronted with the issue directly, the Court declined to indicate how the conflict should be resolved. *(Ibid.)* The issue has been presented squarely in *People v. McGee* (2004) 115 Cal.App.4th 819 [9 Cal.Rptr.3d 586], DEPUBLISHED AND REVIEW GRANTED*,* April 28, 2004, S123474. In *McGee*, the court held that under *Apprendi*, the federal due process clause requires that the jury determine any ancillary facts necessary to establish that a prior conviction qualifies as a serious felony under the "three strikes" law. (*Id.* at p. 834.)

Until the California Supreme Court rules on *McGee*, the court must decide whether to submit any ancillary factual issues on a prior conviction to the jury. The court may use CALCRIM No. 3103: *Prior Conviction: Factual Issue for Jury*, inserting an appropriate description of the factual issue presented.

Prior Prison Term and "Washout" Period

A similar issue arises over whether the jury or the court must decide if the defendant served a prison term as a result of a particular conviction and if the defendant has been free of custody for sufficient time to satisfy the "washout" period. (See Pen. Code, § 667.5(a) & (b).) In *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901], the Court of Appeal held that the jury must determine whether the defendant served a prior prison term for a felony conviction. The other holdings in *Winslow* were rejected by the California Supreme Court. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley, supra,* 9 Cal.4th at p. 592.) However, the *Winslow* holding that the jury must determine if the defendant served a prison term for a felony conviction remains controlling authority.

But, in *People v. Epps, supra,* 25 Cal.4th at pp. 25–26, the Court expressed doubt, in dicta, about whether the fact of having served a prison term is properly submitted to the jury. Discussing the 1997 amendment to Penal Code section 1025, the Court noted that

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> [t]he analysis lists the following questions that the jury would still decide if Senate Bill 1146 became law: . . . 'Was the defendant sentenced to prison based on that conviction? How long has the defendant been out of custody since he or she suffered the prior conviction?' . . .
>
> [T]hough we do not have a case before us raising the issue, it appears that many of the listed questions are the sort of legal questions that are for the court under [*Wiley*]. For example, determining . . . whether the defendant was sentenced to prison is "largely legal" (*Kelii*, *supra*, 21 Cal. 4th at p. 455, quoting *Wiley*, *supra*, 9 Cal. 4th at p. 590), and though these questions require resolution of some facts, "a factual inquiry, limited to examining court documents, is . . . 'the type of inquiry traditionally performed by judges as part of the sentencing function.'" (*Kelii*, at p. 457, quoting *Wiley*, at p. 590.) . . . Therefore, the list of questions in the committee analysis should not be read as creating new jury trial rights that did not exist under *Wiley*.

(Ibid.)

On the other hand, *Apprendi* and *McGee*, discussed above, could be interpreted as requiring the jury to make these factual findings. (But see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [110 Cal.Rptr.2d 571] [even under *Apprendi*, no federal due process right to have jury determine whether defendant served a prior prison term].)

Until the California Supreme Court resolves this question, the court should consider submitting to the jury the issues of whether the defendant served a prison term and whether the defendant has remained free of custody for sufficient time to satisfy the "washout" period. The court may use CALCRIM No. 3102, *Prior Conviction: Prison Prior*.

RELATED ISSUES

Review Limited to Record of Conviction

When determining if a prior conviction comes under a particular recidivist statute, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction" but may not consider facts outside the record of conviction. (*People v. Myers* (1993) 5 Cal.4th 1193, 1195 [22 Cal.Rptr.2d 911, 858 P.2d 301]; see also *People v.*

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Riel (2000) 22 Cal.4th 1153, 1204–1205 [96 Cal.Rptr.2d 1, 998 P.2d 969]; *People v. Henley* (1999) 72 Cal.App.4th 555, 564 [85 Cal.Rptr.2d 123].) The prosecution bears the burden of proving that the prior conviction meets the requirements of the enhancement statute. (*People v. Henley, supra,* 72 Cal.App.4th at pp. 564–565.)

Constitutionality of Prior

The prosecution is not required to prove the constitutional validity of a prior conviction as an "element" of the enhancement. (*People v. Walker* (2001) 89 Cal.App.4th 380, 386 [107 Cal.Rptr.2d 264].) Rather, following the procedures established in *People v. Sumstine* (1984) 36 Cal.3d 909, 922–924 [206 Cal.Rptr. 707, 687 P.2d 904], and *People v. Allen* (1999) 21 Cal.4th 424, 435–436 [87 Cal.Rptr.2d 682, 981 P.2d 525], the defense may bring a motion challenging the constitutional validity of the prior. These questions are matters of law to be determined by the trial court.

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3101. Prior Conviction: Bifurcated Trial

The People have alleged that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <*insert number[s] or description[s] of exhibit[s]*>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <*insert code section[s] alleged*>, on _____ <*insert date*>, in the _____ <*insert name of court*>, Case Number _____ <*insert docket or case number*>(;/.)

[AND <*Repeat for each prior conviction alleged.*>**]**

[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. Give this instruction if the court has granted a bifurcated trial. The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary to CALCRIM No. 3100 discusses this issue. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

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If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103: *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary to CALCRIM No. 3100 discusses this issue.

Give the bracketed paragraph that begins with "In deciding whether the People have proved" on request.

The court must provide the jury with a verdict form on which the jury will indicate whether each prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Statutory Authority. Pen. Code, §§ 1025, 1158.
- Bifurcation. *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines If Defendant Is Person Named in Documents. Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Disputed Factual Issues. See *People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *People v. McGee* (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474 [9 Cal.Rptr.3d 586]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901].
- Three-Strikes Statutes. Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony. Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony. Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior. Pen. Code, § 667.5(b).
- Serious Felony Defined. Pen. Code, § 1192(c).
- Violent Felony Defined. Pen. Code, § 667.5(c).

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Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 515.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

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3102. Prior Conviction: Prison Prior

If you find that the defendant was previously convicted of _____ <*insert description of prior conviction*>, you must also decide whether the People have proved that the defendant served a separate prison term for the crime and did not remain (out of prison custody/ [and] free of a new felony conviction) for (5/10) years.

To prove this allegation, the People must prove that:

1. **The defendant served a separate prison term for the crime of _____ <*insert description of prior conviction*>;**

AND [EITHER]

[2[A]. The defendant did not remain out of prison custody for (5/10) years after (he/she) was no longer in prison custody for that crime(;/.)]

[OR]

[2[B]. The defendant was convicted of a new felony that (he/she) committed within (5/10) years after (he/she) was no longer in prison custody.]

A person *served a separate prison term for a crime* if he or she served a continuous period of prison confinement imposed for that crime. [The prison term may have been served for that crime alone or in combination with prison terms imposed at the same time for other crimes.] [A person is still *serving a separate prison term for a crime* if he or she is placed back in custody (following an escape/ [or] for a parole violation).] [If a person is returned to custody following (an escape/ [or] a parole violation) and is also sentenced to prison for a new crime, then that person is serving a new separate prison term.]

A person is *in prison custody* until he or she is discharged from prison or released on parole, whichever happens first. [A person is also *in prison custody* if he or she (is placed back in custody for a parole violation/ [or] has unlawfully escaped from custody).]

A *prison term* includes confinement in [(a/the)] (state prison/ federal penal institution/California Youth Authority/_____

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<insert name of hospital or other institution where confinement entitles person to prison credits>).

[A *prison term* includes commitment to the State Department of Mental Health as a mentally disordered sex offender following a felony conviction if the commitment lasts more than one year.]

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony if the defendant served one year or more in prison for the crime.]**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

Review the Commentary to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, regarding the current state of the law on whether the court must submit these issues to the jury. If the court gives this instruction, the court **must** also give either CALCRIM No. 3100 or CALCRIM No. 3101.

The court must give one of the bracketed elements (did not remain out of prison custody or was convicted of a new felony), depending on the prosecution's theory. The court may give both of the bracketed elements with the bracketed words "either" and "or."

The court may give the bracketed sentence that begins with "If a person is returned to custody following (an escape/ [or] a parole violation) and is also sentenced to prison for a new offense" on request if relevant based on the evidence. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [17 Cal.Rptr.3d 596, 95 P.3d 865].)

If the court gives this instruction, the court must provide the jury with a verdict form on which the jury will indicate whether the allegation has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Disputed Factual Issues. See *People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th

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452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *People v. McGee* (2004) 115 Cal.App.4th 819 [9 Cal.Rptr.3d 586], DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901].

- Burden of Proof. *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1231 [8 Cal.Rptr.3d 247].
- Continuous, Completed Term. *People v. Medina* (1988) 206 Cal.App.3d 986, 991–992 [254 Cal.Rptr. 89]; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56 [237 Cal.Rptr. 249].
- Term for Offense Committed in Prison Is Separate. *People v. Langston* (2004) 33 Cal.4th 1237, 1242 [17 Cal.Rptr.3d 596, 95 P.3d 865]; *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1410 [18 Cal.Rptr.2d 383]; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56 [237 Cal.Rptr. 249].
- Direct Commitment to Youth Authority as Minor Is Not Prison Prior. *People v. Seals* (1993) 14 Cal.App.4th 1379, 1384–1385 [18 Cal.Rptr.2d 676].
- New Commitment Following Escape Is Separate Prison Term. *People v. Langston* (2004) 33 Cal.4th 1237, 1241, 1246 [17 Cal.Rptr.3d 596, 95 P.3d 865].
- Three-Year Enhancement for Prison Prior If Violent Felony. Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior. Pen. Code, § 667.5(b).
- Violent Felony Defined. Pen. Code, § 667.5(c).

Secondary Sources

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.80 (Matthew Bender).

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RELATED ISSUES

Commitment to Youth Authority

A direct commitment to the California Youth Authority (CYA) under Welfare and Institutions Code section 1731.5(a) is not a prison prior for the purposes of Penal Code section 667.5. (Pen. Code, § 667.5(j); *People v. Seals* (1993) 14 Cal.App.4th 1379, 1383–1385 [18 Cal.Rptr.2d 676].) Time at the CYA qualifies as a prison prior only if the person was sentenced to state prison and transferred to the CYA for housing under Welfare and Institutions Code section 1731.5(c). (*People v. Seals, supra,* 14 Cal.App.4th at pp. 1383–1385.)

Term for Offense Committed in Prison Is Separate

"When a consecutive sentence is imposed under section 1170.1, subdivision (c), for an offense committed in state prison, section 1170.1 requires such sentence to commence *after* the completion of the term for which the defendant was originally imprisoned. Thus, each term is a separate, 'continuous completed' term, which is available for enhancement under section 667.5 if the defendant is subsequently convicted of a felony." (*People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1409–1410 [18 Cal.Rptr.2d 383] [footnote and citations omitted; italics in original]; see also *People v. Langston* (2004) 33 Cal.4th 1237, 1242 [17 Cal.Rptr.3d 596, 95 P.3d 865].)

Calculating "Washout" Period

Penal Code section 667.5, subdivisions (a) and (b), contain "washout" periods of 10 and 5 years, respectively. The prosecution bears the burden of proving that the "washout" period does not apply to a particular conviction. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232 [8 Cal.Rptr.3d 247].) The "washout" period commences when the defendant is discharged from custody or released on parole, "whichever first occurs." (Pen. Code, § 667.5(d); *People v. Nobleton* (1995) 38 Cal.App.4th 76, 84–85 [44 Cal.Rptr.2d 611].) Any return to prison on a parole violation is considered part of the original prison term. (Pen. Code, § 667.5(d).) Thus, in calculating whether the defendant has remained free of prison custody and a felony conviction for sufficient time, the calculation begins from when the defendant was released on parole without subsequently returning to prison on a parole violation. (*People v. Nobleton, supra,* 38 Cal.App.4th at pp. 84–85.) The calculation ends when the defendant commits a new offense that ultimately results in a felony conviction. (*People v. Fielder,*

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supra, 114 Cal.App.4th at p. 1233.) The date the offense is committed, not the date of the ultimate conviction, is controlling. (*Id.* at pp. 1233–1234.) The new felony ends the allowable time for the "washout" period regardless of whether the defendant was sentenced to prison for the new felony. (*Id.* at p. 1230.)

See the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

(New January 2006)

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3103. Prior Conviction: Factual Issue for Jury

If you find that the defendant was previously convicted of the crime of _____ <*insert description of prior conviction*>, you must also decide whether the People have proved that in the commission of that prior crime _____ <*insert description of other factual issue, e.g., the defendant personally used a firearm*>.

To prove this allegation, the People must prove that:

<INSERT ELEMENTS REQUIRED.>

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

To determine whether or not this instruction is required, review the Commentary to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, regarding the current state of the law on whether the jury must determine ancillary factual issues.

If the court gives this instruction, the court must provide the jury with a verdict form on which the jury will indicate whether the allegation has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Statutory Authority. Pen. Code, §§ 1025, 1158.
- Disputed Factual Issues. See *People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *People v. McGee* (2004) 115 Cal.App.4th 819 [9 Cal.Rptr.3d 586], DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901].

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Secondary Sources

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60[2][b], [c][ii], [3][b], 91.80[1][c], [2][a][ii] (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

(New January 2006)

3104–3114. Reserved for Future Use

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B. ARMED WITH FIREARM

3115. Armed With Firearm, Pen. Code, § 12022(a)(1)

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals was armed with a firearm in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

A principal is *armed* with a firearm when that person:

1. **Carries a firearm [or has a firearm available] for use in either offense or defense in connection with the crime[s] charged in Count[s] ____ [or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>,];**

AND

2. **Knows that he or she is carrying the firearm [or has it available].**

<If there is an issue in the case over whether the principal was armed with the firearm "in the commission of" the offense, see Bench Notes.>

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The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708 [76 Cal.Rptr.2d 660, 958 P.2d 412].) However, this procedure is not required. (*Id.* at p. 705.)

In the definition of "armed," the court may give the bracketed phrase "or has a firearm available" on request if the evidence shows that the firearm was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the principal was armed "in the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

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If there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, CALCRIM Nos. 400–410.

AUTHORITY

- Enhancement. Pen. Code, § 12022(a)(1).
- Principal Defined. Pen. Code, § 31.
- Firearm Defined. Pen. Code, § 12001(b).
- Armed. *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411 [38 Cal.Rptr.2d 214], 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- "In Commission of" Felony/Facilitative Nexus. *People v. Bland* (1995) 10 Cal.4th 991, 1002 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Presence of Gun Cannot Be Accident or Coincidence. *Smith v. United States* (1993) 508 U.S. 223, 238 [113 S.Ct. 2050, 124 L.Ed.2d 138].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

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RELATED ISSUES

Defendant Need Not Know Principal Armed

For an enhancement charged under Penal Code section 12022(a) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal was armed. (*People v. Overten* (1994) 28 Cal.App.4th 1497, 1501 [34 Cal.Rptr.2d 232].)

Conspiracy

A defendant convicted of conspiracy may also receive an enhancement for being armed during the conspiracy, regardless of whether the defendant is convicted of the offense alleged to be the target of the conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294, 298 [99 Cal.Rptr.2d 354].)

Facilitative Nexus/Connection

Even though the Supreme Court is currently reviewing the Court of Appeal's decision in *People v. Pitto*, the committee has revised the language of this instruction to more clearly express the facilitative nexus required in *People v. Bland* (1995) 10 Cal.4th 991, 1002 [43 Cal.Rptr.2d 77, 898 P.2d 391] [contemporaneous possession of illegal drugs and firearm not sufficient without evidence of facilitative nexus between the two, comparing to federal law requirement of carrying a firearm 'during and in relation to' drug trafficking].

(Revised August 2006)

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3116. Armed With Firearm: Assault Weapon, Machine Gun, or .50 BMG Rifle, Pen. Code, § 12022(a)(2)

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals was armed with (an assault weapon/a machine gun/a .50 BMG rifle) in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

[(A/An) _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*> is an *assault weapon*.]

[A *machine gun* is any weapon that (shoots[,]/ [or] is designed to shoot[,]/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.] [(A/An) _____ <*insert name of weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machine gun*> is [also] a *machine gun*.]

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base to the tip of the bullet;**
2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

AND

3. **The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]**

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[The term *(assault weapon/machine gun/.50 BMG rifle)* is defined in another instruction.]

[(An assault weapon/A machine gun/A .50 BMG rifle) does not need to be in working order if it was designed to shoot and appears capable of shooting.] [(An assault weapon/A machine gun/A .50 BMG rifle) does not need to be loaded.]

A principal is *armed* with (an assault weapon/a machine gun/a .50 BMG rifle) when that person:

1. **Carries (an assault weapon/a machine gun/a .50 BMG rifle) [or has (an assault weapon/a machine gun/a .50 BMG rifle) available] for use in either offense or defense in connection with the crime[s] charged in Count[s] _____ [or the lesser crime[s] of _____** *<insert name[s] of alleged lesser offense[s]>*;

[AND]

2. **Knows that he or she is carrying the weapon [or has it available](./;)**

<See Bench Notes regarding element 3.>

[AND

3. **Knows or reasonably should know that the weapon has characteristics that make it (an assault weapon/a machine gun/a .50 BMG rifle).]**

<If there is an issue in the case over whether the principal was armed with the firearm "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

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The Supreme Court has held that for the crime of possession of an assault weapon, the prosecution must prove that the defendant knew or reasonably should have known that the weapon possessed the characteristics of an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].) It is unclear if this holding applies to an enhancement for being armed with an assault weapon. Element 3 is provided for the court to use at its discretion.

The court should give the bracketed definition of "assault weapon," "machine gun," or ".50 BMG rifle" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708 [76 Cal.Rptr.2d 660, 958 P.2d 412].) However, this procedure is not required. (*Id.* at p. 705.)

In the definition of "armed," the court may give the bracketed phrase "or has (an assault weapon/a machine gun) available" on request if the evidence shows that the weapon was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the principal was armed "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, CALCRIM Nos. 400–410.

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AUTHORITY

- Enhancement. Pen. Code, § 12022(a)(2).
- Principal Defined. Pen. Code, § 31.
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1.
- Machine Gun Defined. Pen. Code, § 12200.
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Knowledge Required for Possession of Assault Weapon. *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Armed. *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- "In Commission of" Felony/Facilitative Nexus. *People v. Bland* (1995) 10 Cal.4th 991, 1002 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1011–1013 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Presence of Gun Cannot Be Accident or Coincidence. (*Smith v. United States* (1993) 508 U.S. 223, 238 [113 S.Ct. 2050, 124 L.Ed.2d 138]).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

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RELATED ISSUES

See the Related Issues section of CALCRIM No. 3115, *Armed With Firearm, Pen. Code, § 12022(a)(1).*

(Revised August 2006)

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3117. Armed With Firearm: Knowledge That Coparticipant Armed, Pen. Code, § 12022(d)

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant knew that someone who was a principal was armed with a firearm in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **Someone who was a principal in the crime was armed with a firearm during the commission [or attempted commission] of that crime;**

AND

2. **The defendant was also a principal in the crime and knew that the other person was armed with a firearm.**

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

A principal is *armed* with a firearm when that person:

1. **Carries a firearm [or has a firearm available] for use in either offense or defense in connection with the crime[s] charged in Count[s] _____ [or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>];**

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AND

2. Knows that he or she is carrying the firearm [or has it available].

<If there is an issue in the case over whether the principal was armed with the firearm "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708 [76 Cal.Rptr.2d 660, 958 P.2d 412].) However, this procedure is not required. (*Id.* at p. 705.)

In the definition of "armed," the court may give the bracketed phrase "or has a firearm available" on request if the evidence shows that the firearm was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

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If the case involves an issue of whether the principal was armed "during the commission" of the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, CALCRIM Nos. 400–410.

AUTHORITY

- Enhancement. Pen. Code, § 12022(d).
- Principal Defined. Pen. Code, § 31.
- Firearm Defined. Pen. Code, § 12001(b).
- Armed. *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- "In Commission of" Felony/Facilitative Nexus. *People v. Bland* (1995) 10 Cal.4th 991, 1002 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1011–1013 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Presence of Gun Cannot Be Accident or Coincidence. (*Smith v. United States* (1993) 508 U.S. 223, 238 [113 S.Ct. 2050, 124 L.Ed.2d 138]).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

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5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

RELATED ISSUES

Conspiracy

A defendant convicted of conspiracy may also receive an enhancement for being armed during the conspiracy, regardless of whether the defendant is convicted of the offense alleged to be the target of the conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294, 298 [99 Cal.Rptr.2d 353].)

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C. PERSONALLY ARMED WITH DEADLY WEAPON OR FIREARM

3130. Personally Armed With Deadly Weapon

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a deadly weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

A person is *armed* with a deadly weapon when that person:

1. **Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense;**

AND

2. **Knows that he or she is carrying the deadly weapon [or has it available].**

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<If there is an issue in the case over whether the defendant was armed with the weapon "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed portion that begins with "When deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of "armed," the court may give the bracketed phrase "or has a deadly weapon available" on request if the evidence shows that the weapon was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

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AUTHORITY

- Enhancement. Pen. Code, § 12022.3.
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Armed. *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Must Be Personally Armed. *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

RELATED ISSUES

Penal Code Section 220

A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense.

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(*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, "translates into an attempt to commit" a sexual offense. (*People v. Rich, supra,* 109 Cal.App.4th at p. 261.)

Multiple Weapons

There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

Pepper Spray

In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury's determination that pepper spray was a deadly weapon.

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3131. Personally Armed With Firearm

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a firearm during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

A person is *armed* with a firearm when that person:

1. **Carries a firearm [or has a firearm available] for use in either offense or defense;**

AND

2. **Knows that he or she is carrying the firearm [or has it available].**

<If there is an issue in the case over whether the defendant was armed with the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of "armed," the court may give the bracketed phrase "or has a firearm available" on request if the evidence shows that the firearm was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed during the commission of the offense and having been convicted of a specified prior crime, the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, with this instruction unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial.

AUTHORITY

- Enhancement. Pen. Code, §§ 1203.06(a)(2), 12022(c), 12022.3.
- Firearm Defined. Pen. Code, § 12001(b).

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- Armed. *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Personally Armed. *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208 [11 Cal.Rptr.2d 645].
- Must Be Personally Armed for Enhancement Under Penal Code Section 12022.3. *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- Defendant Not Present When Drugs and Weapon Found. *People v. Marvin Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

RELATED ISSUES

Defendant Not Present When Drugs and Weapon Found

In *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391], the defendant was convicted of possession of a controlled substance and an enhancement for being armed during that offense despite the fact that he was not present when the police located the illegal drugs

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and firearm. The Court held that there was sufficient evidence to support the arming enhancement, stating:

> [W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm's presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was "armed with a firearm in the commission" of a felony within the meaning of section 12022.

(*Ibid.*)

The *Bland* case did not state that the jury should be specifically instructed in these inferences, and it appears that no special instruction was given in *Bland*. If the prosecution requests a special instruction on this issue, the court may consider using the following language:

> If the People have proved that a firearm was found close to the _____ <*insert type of controlled substance allegedly possessed*> in a place where the defendant was frequently present, you may but are not required to conclude that:
>
> 1. The defendant knew the firearm was present;
> 2. It was not accidental or coincidental that the firearm was present together with the drugs;
>
> AND
>
> 3. During at least part of the time that the defendant allegedly possessed the illegal drug, (he/she) had the firearm close at hand and available for immediate use to aid in the drug offense.
>
> If you find beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm during the commission [or attempted commission] of the _____ <*insert name of alleged offense*>] [or the

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lesser crime of _____ <*insert name of alleged lesser offense*>].

Multiple Defendants—Single Weapon

Two or more defendants may be personally armed with a single weapon at the same time. (*People v. Smith* (1992) 9 Cal.App.4th 196, 205 [11 Cal.Rptr.2d 645].) It is for the jury to decide if the firearm was readily available to both defendants for use in offense or defense. *(Ibid.)*

For enhancements charged under Penal Code section 12022.3, see also the Related Issues section of CALCRIM No. 3130, *Personally Armed With Deadly Weapon*.

Definition of "during the commission of"

See CALCRIM No. 3261.

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3132. Personally Armed With Firearm: Unlawfully Armed When Arrested

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If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was unlawfully armed with a firearm when (he/she) was arrested for that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant was personally armed with a firearm when (he/she) was arrested for the crime;**

AND

2. **The defendant possessed the firearm unlawfully.**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

A person is *armed* with a firearm when that person:

1. **Carries a firearm [or has a firearm available] for use in either offense or defense;**

AND

2. **Knows that he or she is carrying the firearm [or has it available].**

Other instructions explain what is necessary for the People to prove that the defendant possessed the firearm unlawfully. You must apply those instructions when you decide whether the People have proved this additional allegation.

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The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court **must also give** the appropriate instruction on unlawful possession of a firearm under Penal Code section 12021, 12025, or 12031. See CALCRIM Nos. 2500 et seq., on weapons.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of "armed," the court may give the bracketed phrase "or has a firearm available" on request if the evidence shows that the firearm was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed when arrested and having been convicted of a specified prior crime, the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, with this instruction unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial.

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AUTHORITY

- Enhancement. Pen. Code, § 1203.06(a)(2).
- Firearm Defined. Pen. Code, § 12001(b).
- Armed. *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Personally Armed. *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208 [11 Cal.Rptr.2d 645].
- Firearm Need Not Be Operable. See *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

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D. PERSONALLY USED DEADLY WEAPON OR FIREARM

3145. Personally Used Deadly Weapon

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly [or dangerous] weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally does [any of] the following:

[1.] Displays the weapon in a menacing manner(./;)

[OR]

[2. Hits someone with the weapon(./;)]

[OR

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(3/2). Fires the weapon.]

<If there is an issue in the case over whether the defendant used the weapon "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed "or dangerous" phrases if the enhancement charged uses both the words "deadly" and "dangerous" to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word "deadly." (Pen. Code, § 12022.3.)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of "personally uses," the court may give the bracketed item 3 if the case involves an object that may be "fired."

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.61(e)(4), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.

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- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses. *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(3).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon. *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 40.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 320, 324–332.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.30, 91.81[1][d] (Matthew Bender).

RELATED ISSUES

No Duty to Instruct on "Lesser Included Enhancements"

"[A] trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.' " (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

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Weapon Displayed Before Felony Committed

Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was "at least . . . an aid in completing an essential element of the subsequent crimes. . . ." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

Weapon Used Did Not Cause Death

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. *(Ibid.)* The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be "a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime." *(Ibid.)* [ellipsis and brackets omitted] Here, the court found that "[t]he knife was instrumental to the consummation of the murder and was used to advantage." *(Ibid.)*

"One Strike" Law and Use Enhancement

Where the defendant's use of a weapon has been used as a basis for applying the "one strike" law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement

"A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b)." (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

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Robbery and Use of Deadly Weapon Enhancement

A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

(New January 2006)

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3146. Personally Used Firearm

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a firearm during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

Someone *personally uses* a firearm if he or she intentionally does any of the following:

1. **Displays the firearm in a menacing manner;**
2. **Hits someone with the firearm;**

OR

3. **Fires the firearm.**

<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.5(c)(8), 667.61(e)(4), 1203.06, 1192.7(c)(8), 12022.3, 12022.5, 12022.53(b).
- Firearm Defined. Pen. Code, § 12001(b).
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201]; see also Pen. Code, § 12022.53(b).
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887]; see also Pen. Code, § 12022.53(b).
- Personally Uses. *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(3).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

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- May Not Receive Enhancement for Both Using and Being Armed With One Weapon. *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 321–332.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.30, 91.81[1][d] (Matthew Bender).

RELATED ISSUES

Assault With Firearm

An enhancement under Penal Code section 12022.5 may be applied to a conviction for assault with a firearm. (Pen. Code, § 12022.5(d).) The enhancements provided by Penal Code section 12022.53 may be applied to assault with a firearm on a peace officer, but to no other charge of assault. (Pen. Code, § 12022.53(a).)

Multiple Victims—Penal Code Section 12022.5

A defendant may receive multiple use enhancements under Penal Code section 12022.5 if convicted of multiple charges based on multiple victims even if the crimes occurred in a single "transaction" or "occurrence." (*In re Tameka C.* (2000) 22 Cal.4th 190, 195–198 [91 Cal.Rptr.2d 730, 990 P.2d 603].) Thus, where the defendant was convicted of two counts of assault based on firing a single shot at one person, injuring a second, unintended victim, the defendant properly received two use enhancements. (*Id.* at p. 200.)

See the Related Issues section of CALCRIM No. 3145, *Personally Used Deadly Weapon*.

(New January 2006)

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3147. Personally Used Firearm: Assault Weapon, Machine Gun, or .50 BMG Rifle

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If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used (an assault weapon/a machine gun/a .50 BMG rifle) during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[(A/An) _____ <*insert type of weapon from Pen. Code, § 12276 or description from § 12276.1*> **is an *assault weapon*.]**

[A *machine gun* is any weapon that (shoots[,]/ [or] is designed to shoot[,]/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.] [(A/An) _____ <*insert name of weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machine gun*> **is [also] a *machine gun.*]**

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base to the tip of the bullet;**
2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

AND

3. **The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]**

[The term *(assault weapon/machine gun/.50 BMG rifle)* is defined in another instruction.]

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[(An assault weapon/A machine gun/A .50 BMG rifle) does not need to be in working order if it was designed to shoot and appears capable of shooting.] [(An assault weapon/A machine gun/A .50 BMG rifle) does not need to be loaded.]

Someone *personally uses* (an assault weapon/a machine gun/a .50 BMG rifle) if he or she [knows or reasonably should know that the weapon has characteristics that make it (an assault weapon/a machine gun/a .50 BMG rifle) and] intentionally does any of the following:

1. **Displays the (assault weapon/machine gun/.50 BMG rifle) in a menacing manner;**
2. **Hits someone with the (assault weapon/machine gun/.50 BMG rifle);**

OR

3. **Fires the (assault weapon/machine gun/.50 BMG rifle).**

<If there is an issue in the case over whether the defendant used the weapon "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The Supreme Court has held that for the crime of possession of an assault weapon, the prosecution must prove that the defendant knew or reasonably should have known that the weapon possessed the characteristics of an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].) It is unclear if this holding applies to an enhancement for using an assault weapon. In the definition of "personally uses," the court may give the bracketed phrase that begins "knows or reasonably should know" at its discretion.

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The court should give the bracketed definition of "assault weapon" or "machine gun" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.5(b).
- Assault Weapon Defined. Pen. Code, §§ 12276, 12276.1.
- Machine Gun Defined. Pen. Code, § 12200.
- .50 BMG Rifle Defined. Pen. Code, § 12278.
- Knowledge Required for Assault Weapon Possession. *In re Jorge M.* (2000) 23 Cal.4th 866, 887 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201]; see also Pen. Code, § 12022.53(b).
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887]; see also Pen. Code, § 12022.53(b).
- Personally Uses. *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(3).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 673]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon. *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 321–332.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.30[1] (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3145, *Personally Used Deadly Weapon*, and CALCRIM No. 3146, *Personally Used Firearm*.

(New January 2006)

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3148. Personally Used Firearm: Intentional Discharge

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that offense. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of the crime;**

AND

2. **The defendant intended to discharge the firearm.**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

<If there is an issue in the case over whether the defendant discharged the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) If the defendant is charged with an enhancement for both intentional discharge *and* intentional

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discharge causing great bodily injury or death, the court may give CALCRIM No. 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged*, instead of this instruction.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.53(c).
- Firearm Defined. Pen. Code, § 12001(b).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 322.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.30[5] (Matthew Bender).

RELATED ISSUES

Self-Defense and Imperfect Self-Defense

Penal Code section 12022.53(*l*) provides that "[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm

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. . . by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5." In *People v. Watie* (2002) 100 Cal.App.4th 866, 884 [124 Cal.Rptr.2d 258], the court held, "[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section's application. It does not exempt imperfect self-defense." Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

(New January 2006)

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3149. Personally Used Firearm: Intentional Discharge Causing Injury or Death

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If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that crime causing (great bodily injury/ [or] death). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;**
2. **The defendant intended to discharge the firearm;**

AND

3. **The defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give CALCRIM No. 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged*, instead of this instruction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that

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begins with "An act causes. . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause. . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the firearm "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If, in element 3, the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

AUTHORITY

- Enhancement. Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- Firearm Defined. Pen. Code, § 12001(b).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Proximate Cause. *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 322.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

RELATED ISSUES

Need Not Personally Cause Injury or Death

"[Penal Code] Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' (italics added), but only that he 'proximately caused' the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things." (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 336 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [italics in original].)

Person Injured or Killed Need Not Be Victim of Crime

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052 [12 Cal.Rptr.3d 325, 88 P.3d 56], the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The Court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The Court observed that "the phrase, 'any person other than an accomplice,' does not mean 'the victim' of the underlying crime." (*Id.* at p. 1055.) Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)

Multiple Enhancements for Single Injury

The Court in *Oates* ((2004) 32 Cal.4th 1048 [12 Cal.Rptr.3d 325, 88 P.3d 56]; discussed above) also held that the trial court was required to impose all five subdivision (d) enhancements because Penal Code section 12022.53(f) requires a court to impose the longest enhancement available.

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(*Id.* at p. 1056.) The Court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to "the long-recognized, judicially-created exception for cases involving multiple victims of violent crime." (*Id.* at p. 1062.) Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)

Multiple Enhancements May Not be Imposed Based on Multiple Participants

In *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1054, fn. 3 [21 Cal.Rptr.3d 859], the defendant and two others simultaneously shot at the decedent. The defendant was convicted of personally inflicting death by use of a firearm. (*Id.* at p. 1053; Pen. Code, § 12022.53(d).) In addition to the sentence for personally using a firearm, the trial court also imposed two sentences under Penal Code section 12022.53(e)(1) based on the other two participants having also fired at the decedent (*People v. Cobb, supra*, at p. 1053.) The Court of Appeal reversed the latter two enhancements, holding that Penal Code section 12022.53(f) did not permit multiple sentence enhancements based on multiple participants in one crime. (*Id.* at p. 1058.)

Self-Defense and Imperfect Self-Defense

Penal Code section 12022.53(*l*) provides that "[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5." In *People v. Watie* (2002) 100 Cal.App.4th 866, 884 [124 Cal.Rptr.2d 258], the court held, "[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section's application. It does not exempt imperfect self-defense." Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

(New January 2006)

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3150. Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death—Both Charged

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If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegations that the defendant personally and intentionally discharged a firearm during (that/those) crime[s] and, if so, whether the defendant's act caused (great bodily injury/ [or] death). [You must decide whether the People have proved these allegations for each crime and return a separate finding for each crime.]

To prove that the defendant intentionally discharged a firearm, the People must prove that:

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;**

AND

2. **The defendant intended to discharge the firearm.**

If the People have proved both 1 and 2, you must then decide whether the People also have proved that the defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing

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unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each of these allegations beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) This instruction may be used when the defendant is charged with an enhancement both for intentional discharge *and* for intentional discharge causing great bodily injury or death. If only one of these enhancements is charged, do not use this instruction. Instead, give CALCRIM No. 3148, *Personally Used Firearm: Intentional*

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Discharge, or CALCRIM No. 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death*, whichever is appropriate.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes. . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins wtih "There may be more than one cause. . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If, in the paragraph following the elements, the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

AUTHORITY

- Enhancement. Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- Firearm Defined. Pen. Code, § 12001(b).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Proximate Cause. *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].

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- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 322.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM Nos. 3148, *Personally Used Firearm: Intentional Discharge*, and 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death.*

(New January 2006)

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E. GREAT BODILY INJURY

3160. Great Bodily Injury

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <*insert name of injured person*> was not an accomplice to the crime.]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[Committing the crime of _____ <*insert sexual offense charged*> is not by itself the infliction of great bodily injury.]

<*Group Assault*>

[If you conclude that more than one person assaulted _____ <*insert name of injured person*> and you cannot decide which person caused which injury, you may, but are not required to, conclude that the defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> if the People have proved that:

1. **Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;**

AND

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3. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) However,

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there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating], REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The court should review these decisions and any current law before giving the bracketed instruction on group beatings.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 1192.7(c)(8), 12022.7, 12022.8.
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].

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- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction. *People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765]; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating], REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with "the intent to inflict such injury." (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

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Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant's gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. *(Ibid.)* The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [255 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

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3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed

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If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant inflicted great bodily injury that caused _____ <*insert name of injured person*> to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of the crime;**

[AND]

2. **The defendant's acts caused _____ <*insert name of injured person*> to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)**

<*Give element 3 when instructing on whether injured person was an accomplice.*>

[AND

3. **_____ <*insert name of injured person*> was not an accomplice to the crime.]**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[*Paralysis* is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]

<*Group Assault*>

[If you conclude that more than one person assaulted _____ <*insert name of injured person*> and you cannot decide which

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person caused which injury, you may, but are not required to, conclude that the defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> if the People have proved that:

1. **Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;**

AND

3. **The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury.]**

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d

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760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(b).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction. *People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765]; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

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RELATED ISSUES

Coma Need Not Be Permanent

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

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3162. Great Bodily Injury: Age of Victim

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant inflicted great bodily injury on someone who was (under the age of 5 years/70 years of age or older). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of the crime;**

[AND]

2. **At that time, _____ <*insert name of injured person*> was (under the age of 5 years/70 years of age or older)(./;)**

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND

3. **<*insert name of injured person*> was not an accomplice to the crime.]**

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[Committing the crime of _____ <*insert sexual offense charged*> is not by itself the infliction of great bodily injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ <*insert name of injured person*> and you cannot decide which person caused which injury, you may, but are not required to, conclude that the defendant personally inflicted great bodily

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injury on _____ <*insert name of injured person*> if the People have proved that:

1. **Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;**

AND

3. **The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury.]**

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255

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Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, § 12022.7(c) & (d).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction. *People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765]; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

(New January 2006)

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3163. Great Bodily Injury: Domestic Violence

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <*insert name of injured person*> was not an accomplice to the crime.]

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Domestic violence **means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).**

Abuse **means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

[The term *cohabitants* means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to (1) sexual relations

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between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/ domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

[Committing the crime of _____ <*insert sexual offense charged*> **is not by itself the infliction of great bodily injury.]**

<*Group Assault*>

[If you conclude that more than one person assaulted _____ <*insert name of injured person*> **and you cannot decide which person caused which injury, you may, but are not required to, conclude that the defendant personally inflicted great bodily injury on _____** <*insert name of injured person*> **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** <*insert name of injured person*> **and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____** <*insert name of injured person*> **during the group assault;**

AND

3. **The amount or type of physical force the defendant used on _____** <*insert name of injured person*> **was enough that it alone could have caused _____** <*insert name of injured person*> **to suffer great bodily injury.]**

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

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2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

[The person who was injured does not have to be a person with whom the defendant had a relationship.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765].) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.

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The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(e).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Dating Relationship Defined. Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required. *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction. *People v. Corona* (1989) 213 Cal.App.3d 589, 594 [261 Cal.Rptr. 765]; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1336–1338 [131 Cal.Rptr.2d 639] [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [4 Cal.Rptr.3d 836] [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch*

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(1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

Person Who Suffers Injury Need Not Be "Victim" of Domestic Abuse

Penal Code section 12022.7(e) does not require that the injury be inflicted on the "victim" of the domestic violence. (*People v. Truong* (2001) 90 Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where "an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair." (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

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F. SEX OFFENSES

3175. Sex Offenses: Sentencing Factors—Aggravated Kidnapping

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant kidnapped _____ <*insert name of alleged victim*>, increasing the risk of harm to (him/her). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant took, held, or detained _____ <*insert name of alleged victim*> by the use of force or by instilling reasonable fear;**
2. **Using that force or fear, the defendant moved _____ <*insert name of alleged victim*> [or made (him/her) move] a substantial distance;**
3. **The movement of _____ <*insert name of alleged victim*> substantially increased the risk of harm to (him/her) beyond that necessarily present in the _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>;**

[AND]

4. **_____ <*insert name of alleged victim*> did not consent to the movement(./;)**

[AND

5. **The defendant did not actually and reasonably believe that _____ <*insert name of alleged victim*> consented to the movement.]**

Substantial distance **means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of _____ <*insert sex offense[s] from Pen. Code,***

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§ 667.61(c)>**. In deciding whether the distance was substantial and whether the movement substantially increased the risk of harm, you must consider all the circumstances relating to the movement.**

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) For paragraphs instructing on actual consent or a reasonable, good faith belief in consent, see CALCRIM No. 1215, *Kidnapping*.

AUTHORITY

- One-Strike Sex Offense Statute—Kidnapping Factor. Pen. Code, § 667.61(d)(2).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Sentencing Factor Does Not Require Specific Intent to Commit Sex Offense. *People v. Jones* (1997) 58 Cal.App.4th 693, 717 [68 Cal.Rptr.2d 506].
- Sentencing Factor Requires Greater Movement Than That Incidental to Offense. *People v. Diaz* (2000) 78 Cal.App.4th 243, 246 [92 Cal.Rptr.2d 682]; *see also People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1052 [16 Cal.Rptr.3d 231] [discussing meaning of "incidental"].
- Elements of Kidnapping. Pen. Code, § 207(a).

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- Asportation Requirement. *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement. See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement. *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent. Pen. Code, § 26, subd. 3 [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Intent Requirement. *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement. *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.38[1], 91.102[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.14 (Matthew Bender).

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RELATED ISSUES

One-Strike Sex Offense Statute—Meaning of Single Occasion

Penal Code section 667.61(g) provides that the sentence provided for by this statute "shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion." The term "single occasion" as used here does not have the same meaning as the term "separate occasion" in Penal Code section 667.6. (*People v. Jones* (2001) 25 Cal.4th 98, 107 [104 Cal.Rptr.2d 753, 18 P.3d 674].) "[F]or the purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity." *(Ibid.)*

See also the Related Issues section of CALCRIM No. 1215, *Kidnapping*.

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3176. Sex Offenses: Sentencing Factors—Aggravated Mayhem

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that, while committing that crime, the defendant also committed aggravated mayhem. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **During the commission of the crime, the defendant unlawfully and maliciously (disabled or disfigured someone permanently/ [or] deprived someone else of a limb, organ, or other part of (his/her) body);**
2. **When the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or other part of (his/her) body);**

AND

3. **Under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person.**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

[The People do not have to prove that the defendant intended to kill.]

<If there is an issue in the case over whether the mayhem was committed "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a

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reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed sentence about the permanency of "disfiguring injury" may be given on request if there is evidence that the injury may be repaired by medical procedures. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that an injury may be permanent even though cosmetic repair may be medically feasible].)

The final bracketed sentence may be given on the prosecution's request when there is no evidence or conflicting evidence that the defendant intended to kill someone. (See Pen. Code, § 205.)

If the case involves an issue of whether the defendant committed the mayhem "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- One-Strike Sex Offense Statute—Aggravated Mayhem Factor. Pen. Code, § 667.61(d)(3).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Elements of Aggravated Mayhem. Pen. Code, § 205.
- Permanent Disability. See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months].

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- Permanent Disfigurement. See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Specific Intent to Cause Maiming Injury. *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833 [267 Cal.Rptr. 283]; *People v. Lee* (1990) 220 Cal.App.3d 320, 324–325 [269 Cal.Rptr. 434].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.16 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*, and CALCRIM No. 800, *Aggravated Mayhem*.

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3177. Sex Offenses: Sentencing Factors—Torture

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that, while committing that crime, the defendant also committed torture. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **During the commission of the crime, the defendant inflicted great bodily injury on someone else;**

AND

2. **When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, or persuasion or for any sadistic purpose.**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[It is not required that a victim actually suffer pain.]

[Someone acts for the purpose of *extortion* if he or she intends to (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone acts for the purpose of *extortion* if he or she (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act. An *official act* is an act that an officer does in his or her official capacity using the authority of his or her public office.]

[Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself.]

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<If there is an issue in the case over whether the torture was inflicted "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Unlike murder by torture, the crime of torture under Penal Code section 206 does not require that the intent to cause pain be premeditated or that any cruel or extreme pain be prolonged. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1205 [68 Cal.Rptr.2d 619]; *People v. Vital* (1996) 45 Cal.App.4th 441, 444 [52 Cal.Rptr.2d 676].) Torture as defined in section 206 focuses on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904].) Give the bracketed sentence stating that "It is not required that a victim actually suffer pain" on request if there is no proof that the alleged victim actually suffered pain.

"Extortion" need not be defined for purposes of torture. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564 [18 Cal.Rptr.2d 395]; but see *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628] [term should be defined for kidnapping under Pen. Code, § 209].) Nevertheless, either of the bracketed definitions of extortion, and the related definition of "official act," may be given on request if any of these issues are raised in the case. (See Pen. Code, § 518 [defining "extortion"]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition of the term].) It appears that this type of extortion would rarely occur in the context of torture, so it is excluded from this instruction.

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"Sadistic purpose" may be defined on request. (See *People v. Barrera, supra,* 14 Cal.App.4th at p. 1564; *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712] [approving use of phrase in torture-murder and special circumstances torture-murder instructions].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give Instruction 3261, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- One-Strike Sex Offense Statute—Torture Factor. Pen. Code, § 667.61(d)(3).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Elements of Torture. Pen. Code, § 206.
- Extortion Defined. Pen. Code, § 518.
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); see, e.g., *People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904] [broken and smashed teeth, split lip, and facial cut sufficient evidence of great bodily injury].
- Cruel Pain Equivalent to Extreme or Severe Pain. *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202 [68 Cal.Rptr.2d 619].
- Intent. *People v. Hale* (1999) 75 Cal.App.4th 94, 106–107 [88 Cal.Rptr.2d 904]; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042–1043 [84 Cal.Rptr.2d 5]; see *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1206 [68 Cal.Rptr.2d 619] [neither premeditation nor intent to inflict prolonged pain are elements of torture].
- Sadistic Purpose Defined. *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202–1204 [68 Cal.Rptr.2d 619]; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 [18 Cal.Rptr.2d 274] [sexual element not required].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch*

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(1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.15 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*. See also CALCRIM No. 810, *Torture*.

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3178. Sex Offenses: Sentencing Factors—Burglary With Intent to Commit Sex Offense

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If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed the crime during the commission of burglary, with the intent to commit _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant entered an inhabited (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building);**
2. **When the defendant entered the (house [or room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) intended to commit _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>;**

AND

3. **After the defendant entered the (house [or room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) committed _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*> [before (he/she) escaped to a place of temporary safety].**

A (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry.

[A *house* includes any (structure/garage/office/_____ <*insert description*>) that is attached to the house and functionally connected with it.]

[The defendant intended to commit rape if he intended to have sexual intercourse with a woman [who was not his wife], without her consent, by (using force, duress, menace, or fear of

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immediate and unlawful bodily injury to her or to another person/threatening to retaliate against her or against a third person with a reasonable possibility that the threat would be carried out/threatening to have her or a third person incarcerated, arrested, or deported).]

[To decide whether the defendant intended to commit _____ <*insert sex offense[s] other than rape from Pen. Code, § 667.61(c)*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[A person has *reached a place of temporary safety* if he or she has successfully escaped from the scene of the crime and is no longer being pursued.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged with rape, give the bracketed sentence that begins with "The defendant intended to commit rape. . . ." If the defendant is charged with another offense, use the next bracketed paragraph, and give all necessary instructions on the Penal Code section 667.61(c) offenses alleged.

For a definition of "vessel," "floating home," or "trailer coach," see CALCRIM No. 1701, *Burglary: Degrees*.

AUTHORITY

- One-Strike Sex Offense Statute—Burglary With Intent to Commit Sex Offense. Pen. Code, § 667.61(d)(4).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d, 41 P.3d 556].

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- During the Commission of Burglary Defined for Sentencing Factor. *People v. Alvarado* (2001) 87 Cal.App.4th 178, 191 [104 Cal.Rptr.2d 624].
- Elements of Burglary. Pen. Code, § 459.
- Determination of Degrees. Pen. Code, § 460.
- Inhabitation Defined. Pen. Code, § 459.
- Room Within Inhabited House. *People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*, CALCRIM No. 1700, *Burglary*, and CALCRIM No. 1701, *Burglary: Degrees*.

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3179. Sex Offenses: Sentencing Factors—Kidnapping

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant kidnapped _____ <*insert name[s] of alleged victim[s]*>. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To decide whether the defendant kidnapped _____ <*insert name[s] of alleged victim[s]*>, please refer to the separate instructions that I (will give/have given) you on kidnapping. You must apply those instructions when you decide whether the People have proved this additional allegation.

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

This sentencing factor applies if "the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5." (Pen. Code, § 667.61(e)(1).) Give the appropriate instruction on kidnapping, depending on which Penal Code section the prosecution alleges, as follows:

Pen. Code, § 207:	CALCRIM No. 1215, *Kidnapping* CALCRIM No. 1200, *Kidnapping: For Child Molestation* CALCRIM No. 1201, *Kidnapping: Person Incapable of Consent*
Pen. Code, § 209:	CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*

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CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*

Pen. Code, § 209.5: CALCRIM No. 1204, *Kidnapping: During Carjacking*

AUTHORITY

- One-Strike Sex Offense Statute—Kidnapping Factor. Pen. Code, § 667.61(e)(1).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Sentencing Factor Does Not Require Specific Intent to Commit Sex Offense. *People v. Jones* (1997) 58 Cal.App.4th 693, 717 [68 Cal.Rptr.2d 506].
- Sentencing Factor Requires More Movement Than Incidental to Offense. *People v. Diaz* (2000) 78 Cal.App.4th 243, 246 [92 Cal.Rptr.2d 682].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.38[1], 91.102[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.14 (Matthew Bender).

RELATED ISSUES

See also the Related Issues sections of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping* and of the instructions on kidnapping, CALCRIM Nos. 1200–1204, 1215.

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3180. Sex Offenses: Sentencing Factors—Burglary

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed the crime during the commission of a burglary. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant entered (a building/an inhabited (house [or a room within an inhabited house]/vessel/floating home/ trailer coach/part of a building));**
2. **When the defendant entered the (building/house [or a room within the house]/vessel/floating home/trailer coach/ part of a building), (he/she) intended to commit (theft/ [or] _____ <*insert one or more felonies*>);**

[AND]

3. **After the defendant entered the (building/house [or a room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) committed _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*> [before (he/she) escaped to a place of temporary safety](./;)**

<Give element 4 only if prosecution alleges defendant entered a building that does not meet definition of inhabited dwelling.>

[AND

4. **When the defendant committed _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>, the building was closed to the public.]**

[A (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry.]

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[A *house* includes any (structure/garage/office/_____ <*insert description*>) that is attached to the house and functionally connected with it.]

<*Alternative A—theft*>

[The defendant intended to commit theft [by larceny] if (he/she) intended to take property owned by someone else, without the owner's consent, to deprive the owner of it permanently [or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property], to move the property, even a small distance, and to keep it for any period of time, however brief.]

<*Alternative B—rape by force, fear, or threats*>

[The defendant intended to commit rape if he intended to have sexual intercourse with a woman [who was not his wife], without her consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to her or to another person/threatening to retaliate against her or against a third person with a reasonable possibility that the threat would be carried out/threatening to have her or a third person incarcerated, arrested, or deported).]

<*Alternative C—other felony*>

[To decide whether the defendant intended to commit _____ <*insert other felony/felonies alleged*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[A person has *reached a place of temporary safety* if (he/she) has successfully escaped from the scene of the crime and is no longer being pursued.]

[The burglary was committed if the defendant entered with the intent to commit (theft/ [or] _____ <*insert one or more felonies*>). The defendant does not need to have actually committed that crime as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or] _____ <*insert one or more felonies*>).]]

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[The People allege that the defendant intended to commit (theft/ [or] _____ <*insert one or more felonies*>). You may not find this allegation true unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not need to all agree on which one of those crimes (he/she) intended.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 127 L.Ed.2d 435].)

If the prosecution alleges that the defendant entered a "building" that does not meet the definition of inhabited dwelling, give element 4.

Give alternative A, B, or C depending on the prosecution's theory about which felony the defendant intended to commit at the time of entry. To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) When giving this portion of the instruction, select the appropriate language in alternative A—theft.

If the prosecution alleges multiple underlying felonies, give the bracketed paragraph that begins with "The People allege that the defendant intended to commit either. . . ." (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

For a definition of "vessel," "floating home," or "trailer coach," see CALCRIM No. 1701, *Burglary: Degrees*.

AUTHORITY

- One-Strike Sex Offense Statute—Burglary. Pen. Code, § 667.61(e)(2).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].

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- During the Commission of Burglary Defined for Sentencing Factor. *People v. Alvarado* (2001) 87 Cal.App.4th 178, 191 [104 Cal.Rptr.2d 624].
- Elements of Burglary. Pen. Code, § 459.
- Determination of Degrees. Pen. Code, § 460.
- Inhabitation Defined. Pen. Code, § 459.
- Room Within Inhabited House. *People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.10 (Matthew Bender).

RELATED ISSUES

"Closed to the Public"

"[T]he commission of a specified sex offense during a burglary is within the statute if the business is closed when the sex offense is committed." (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1295–1296 [94 Cal.Rptr.2d 784].)

See the Related Issues sections of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*, CALCRIM No. 1700, *Burglary*, and CALCRIM No. 1701, *Burglary: Degrees*.

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3181. Sex Offenses: Sentencing Factors—Multiple Victims

If you find the defendant guilty of two or more sex offenses, as charged in Counts ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

This sentencing factor must be pleaded, proved, and found true by the trier of fact. (*People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].) The court may not impose a sentence using this factor unless the jury has specifically made a finding that the factor has been proved, even if the defendant is convicted in the proceeding of qualifying offenses against more than one person. *(Ibid.)*

AUTHORITY

- One-Strike Sex Offense Statute—Multiple Victims Factor. Pen. Code, § 667.61(e)(5).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

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5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][ii], [3] (Matthew Bender).

RELATED ISSUES

"Present Case or Cases"

This sentencing factor applies when the "offenses are prosecuted 'in the present case or cases.' " (*People v. Stewart* (2004) 119 Cal.App.4th 163, 171 [14 Cal.Rptr.3d 353].) There is no requirement that the offenses be committed on the same date or in the course of the same transaction, so long as the offenses are tried together. (*Id.* at p. 172.)

See also the Related Issues section of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*.

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3182. Sex Offenses: Sentencing Factors—Tying or Binding

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant tied or bound _____ <*insert name[s] of alleged victim[s] or other person[s]*> during the commission of (that/those) crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

<If there is an issue in the case as to whether the tying or binding occurred "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If there is an issue in the case as to whether the defendant acted "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- One-Strike Sex Offense Statute—Tying or Binding Factor. Pen. Code, § 667.61(e)(6).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][ii] (Matthew Bender).

RELATED ISSUES

Binding Includes Placing Tape Over Victim's Eyes

In *People v. Campbell* (2000) 82 Cal.App.4th 71, 77–79 [97 Cal.Rptr.2d 830], the court held that "binding" included placing tape over the victim's eyes to prevent her from seeing.

See also the Related Issues section of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*.

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3183. Sex Offenses: Sentencing Factors—Administered Controlled Substance

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant administered a controlled substance to _____ <*insert name[s] of alleged victim[s]*> during the commission of (that/those) crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **In the commission of _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>, the defendant administered _____ <*insert controlled substance from Health & Saf. Code, §§ 11054–11058*> to _____ <*insert name[s] of alleged victim[s]*>;**
2. **The defendant administered the _____ <*insert controlled substance from Health & Saf. Code, §§ 11054–11058*> against that person's will by means of force, violence, or fear of immediate and unlawful bodily injury to that person [or someone else];**

AND

3. **The defendant did so for the purpose of committing _____ <*insert felony alleged*>.**

A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.

<If there is an issue in the case as to whether the defendant acted "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If there is an issue in the case as to whether the defendant acted "during the commission" of the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705] [weapon used before elements of felony committed]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- One-Strike Sex Offense Statute—Administered Controlled Substance. Pen. Code, § 667.61(e)(7).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Elements of Enhancement. Pen. Code, § 12022.75.
- Administering. Health & Saf. Code, § 11002.
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.42, 91.102[2][a][ii] (Matthew Bender).

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RELATED ISSUES

See also the Related Issues section of CALCRIM No. 3175, *Sex Offenses: Sentencing Factors—Aggravated Kidnapping*.

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G. CONTROLLED SUBSTANCES

3200. Controlled Substance: Quantity

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the crime involved [more than] a specified amount [or more] of the controlled substance. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

[1.] The defendant _____ <*insert conduct alleged, e.g., sold or conspired to sell*> **[more than]** _____ <*insert quantity alleged*> **by (weight/volume) [or more] of a substance containing** _____ <*insert controlled substance*>**(./;)**

<*Give element 2 if enhancement alleged in conspiracy count.*>

[AND

2. The defendant was substantially involved in the planning, direction, execution, or financing of the _____ <*insert conduct alleged, e.g., sale*> **of the** _____ <*insert controlled substance*>**.]**

[In deciding whether the required (weight/volume) has been proved, do not take into account plant or vegetable material.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the defendant is charged with an enhancement or a probation ineligibility clause based on the quantity of the controlled substance. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed phrases "more than" if the defendant is charged with an enhancement under Health and Safety Code section 11370.4. Give the bracketed phrases "or more" if the defendant is charged under Health and Safety Code section 11352.5 or Penal Code section 1203.07.

Give bracketed element 2 if an enhancement under Health and Safety Code section 11370.4 is alleged in a count of conspiracy. (Health & Saf. Code, § 11370.4(a); *People v. Salcedo* (1994) 30 Cal.App.4th 209, 217 [35 Cal.Rptr.2d 539].) Do not give element 2 if the defendant is not charged with conspiracy but is being prosecuted for one or more substantive offenses on a theory of coconspirator liability. (*People v. Salcedo, supra,* 30 Cal.App.4th at p. 217.) If the defendant is charged with the enhancement on both conspiracy and substantive offenses, the court should give this instruction once for the conspiracy charge, with element 2, and once for all the substantive offenses, without element 2. If properly instructed, the jury need not make a special finding that the defendant was substantially involved. (*People v. Lobato* (2003) 109 Cal.App.4th 762, 766 [135 Cal.Rptr.2d 429].)

AUTHORITY

- Enhancements and Sentencing Factors. Pen. Code, §§ 1203.07(a)(1), (2) & (4); Health & Saf. Code, §§ 11352.5, 11370.4.
- Substance Containing Controlled Substance—Need Not Be Pure. *People v. Pieters* (1991) 52 Cal.3d 894, 903 [276 Cal.Rptr. 918, 802 P.2d 420].
- Knowledge of Quantity or Specific Intent Not Required. *People v. Meza* (1995) 38 Cal.App.4th 1741, 1748 [45 Cal.Rptr.2d 844].
- Conspiracy Instruction. *People v. Duran* (2001) 94 Cal.App.4th 923, 941–942 [114 Cal.Rptr.2d 595]; *People v. Salcedo* (1994) 30 Cal.App.4th 209, 217 [35 Cal.Rptr.2d 539]; *People v. Lobato* (2003) 109 Cal.App.4th 762, 766 [135 Cal.Rptr.2d 429].

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Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 302, 511.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.42 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[3][e][ii] (Matthew Bender).

RELATED ISSUES

Must Controlled Substance Actually Exist?

In *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1447 [39 Cal.Rptr.2d 781], the court held that, where a defendant is charged with offering to sell, an enhancement under Health and Safety Code section 11370.4 "must be based on the weight of a substance in existence, not on an amount merely offered or negotiated." Thus, the enhancement was not proper where the defendant negotiated to sell five kilograms of heroin but in fact only produced less than one kilogram, or where the defendant offered to sell four kilograms of cocaine but never possessed that substance. (*Valenzuela, supra,* 33 Cal.App.4th at p. 1455.) Similarly, *People v. Lopez* (1993) 20 Cal.App.4th 897, 902–903 [24 Cal.Rptr.2d 649], held that an enhancement under Health and Safety Code section 11379.8 was not proper where the defendant agreed to manufacture more than three pounds of methamphetamine but failed to produce any of the substance. On the other hand, in *People v. Howard* (1995) 33 Cal.App.4th 1407, 1414–1416 [39 Cal.Rptr.2d 766], the court upheld an enhancement where the defendants agreed to purchase seven kilograms of cocaine and had the required money on hand, but the officers conducting the undercover operation only provided one kilogram of the substance. The court distinguished prior holdings, finding that where a defendant is charged with conspiracy to purchase a controlled substance in an undercover operation, it is not necessary for the officers to produce all of the drugs promised. (*Id.* at p. 1416.)

Sentencing Entrapment or Manipulation

Some jurisdictions have recognized a defense of "sentencing entrapment or manipulation," where undercover law enforcement officers persuade a

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defendant to sell or produce a greater quantity of the controlled substance for the purpose of later obtaining a higher mandatory sentence. (See *People v. Smith* (2003) 31 Cal.4th 1207, 1212 [7 Cal.Rptr.3d 559, 80 P.3d 662].) The doctrine of "sentencing entrapment" does not apply in California. *(Ibid.)* In *Smith*, the Court did not decide whether the doctrine of "sentence manipulation" does apply. *(Ibid.)* The Court did find that if the doctrine of sentence manipulation applies in California, its application to a particular case would require "truly outrageous" conduct by law enforcement officers. *(Ibid.)*

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3201. Controlled Substance: Quantity—Manufacture of Controlled Substance

If you find the defendant guilty of the crime[s] charged in Count[s] ____ <*insert counts charging manufacturing or processing of controlled substance*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the crime involved more than a specified amount of the controlled substance. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **A substance used in, to be used in, or produced during the (manufacturing/_____ <*insert description of alleged other process*>) process contained _____ <*insert controlled substance from Health & Saf. Code, §§ 11054–11058*>;**

[AND]

2. **The substance containing _____ <*insert controlled substance*> was more than _____ <*insert quantity alleged*> by (weight/volume)(./;)**

<*Give element 3 if enhancement alleged in conspiracy count.*>

[AND

3. **The defendant was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the (manufacturing/_____ <*insert description of alleged other process*>) of _____ <*insert controlled substance*>.]**

[In deciding whether the required (weight/volume) has been proved, do not take into account plant or vegetable material.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the defendant is charged with an enhancement based on the quantity of the controlled substance. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give bracketed element 3 if the enhancement is alleged in a count of conspiracy to manufacture a controlled substance. (Health & Saf. Code, § 11379.8(e); *People v. Duran* (2001) 94 Cal.App.4th 923, 941 [114 Cal.Rptr.2d 595].) Do not give element 3 if the defendant is not charged with conspiracy but is being prosecuted for one or more substantive offenses on a theory of coconspirator liability. (*People v. Duran, supra,* 94 Cal.App.4th at p. 942.) If the defendant is charged with the enhancement on both conspiracy and substantive offenses, the court should give this instruction once for the conspiracy charge, with element 3, and once for all the substantive offenses, without element 3. If properly instructed, the jury need not make a special finding that the defendant was substantially involved. (*People v. Lobato* (2003) 109 Cal.App.4th 762, 766 [135 Cal.Rptr.2d 429].)

AUTHORITY

- Enhancement. Health & Saf. Code, § 11379.8.
- Substance Containing Controlled Substance—Need Not Be Pure. *People v. Burgio* (1993) 16 Cal.App.4th 769, 774 [20 Cal.Rptr.2d 397].
- Substance Containing Controlled Substance—Used or to Be Used in Process. *People v. Hard* (2003) 112 Cal.App.4th 272, 275 [5 Cal.Rptr.3d 107].
- Knowledge of Quantity or Specific Intent Not Required. *People v. Meza* (1995) 38 Cal.App.4th 1741, 1748 [45 Cal.Rptr.2d 844].
- Conspiracy Instruction. *People v. Duran* (2001) 94 Cal.App.4th 923, 941–942 [114 Cal.Rptr.2d 595]; *People v. Salcedo* (1994) 30 Cal.App.4th 209, 217 [35 Cal.Rptr.2d 539]; *People v. Lobato* (2003) 109 Cal.App.4th 762, 766 [135 Cal.Rptr.2d 429].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 302, 511.

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5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.42 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[3][c] (Matthew Bender).

RELATED ISSUES

Combining Measurements

Health and Safety Code section 11379.8 provides two sets of measurements, one for "liquid by volume" and one for "solids by weight." "[S]o long as there is sufficient evidence, the trier of fact should be permitted to add the common measures of the seized substances in order to meet the statute's standards." (*People v. Good* (1990) 217 Cal.App.3d 1533, 1537 [266 Cal.Rptr. 608].)

See the Related Issues section of CALCRIM No. 3200, *Controlled Substance: Quantity*.

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H. OTHER ENHANCEMENTS

3220. Amount of Loss

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether the People have proved the additional allegation that the value of the property (taken[,]/ [or] damaged[,]/ [or] destroyed) was more than $_____ <*insert amount alleged*>.

To prove this allegation, the People must prove that:

1. **In the commission [or attempted commission] of the crime, the defendant (took[,]/ [or] damaged[,]/ [or] destroyed) property;**
2. **When the defendant acted, (he/she) intended to (take[,]/ [or] damage[,]/ [or] destroy) the property;**

AND

3. **The loss caused by the defendant's (taking[,]/ [or] damaging[,]/ [or] destroying) the property was greater than $_____ <*insert amount alleged*>.**

[If you find the defendant guilty of more than one crime, you may add together the loss from each crime to determine whether the total loss from all the crimes was more than $_____ <*insert amount alleged*> if the People prove that:

A. **The defendant intended to and did (take[,]/ [or] damage[,]/ [or] destroy) property in each crime;**

AND

B. **Each crime arose from a common scheme or plan.]**

[The value of property is the fair market value of the property.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.6.
- Value Is Fair Market Value. *People v. Swanson* (1983) 142 Cal.App.3d 104, 107–109 [190 Cal.Rptr. 768].
- Defendant Need Not Intend to Permanently Deprive Owner of Property. *People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].
- Victim Need Not Suffer Actual Loss. *People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr. 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].
- Defendant Need Not Know or Reasonably Believe Value of Item Exceeded Amount Specified. *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607 [188 Cal.Rptr. 63].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 292.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.45 (Matthew Bender).

COMMENTARY

Penal Code section 12022.6 applies to "any person [who] takes, damages, or destroys any property. . . ." The statute does not explicitly include vicarious liability but also does not use the term "personally" to limit the scope of liability. In *People v. Fulton* (1984) 155 Cal.App.3d 91, 102 [201 Cal.Rptr. 879], the Fourth Appellate District of the Court of Appeal interpreted this language to mean that the statute did not require that the defendant personally take, damage, or destroy the property, but provided

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for vicarious liability. In reaching this conclusion, the court relied on the reasoning of *People v. Le* (1984) 154 Cal.App.3d 1 [200 Cal.Rptr. 839], which held that an enhancement for being armed with a firearm under Penal Code section 12022.3(b) allowed for vicarious liability despite the fact that the statute does not explicitly include vicarious liability. The *Fulton* court also disagreed with the holding of *People v. Reed* (1982) 135 Cal.App.3d 149 [185 Cal.Rptr. 169], which held that Penal Code section 12022.3(b) did not include vicarious liability. However, the *Fulton* decision failed to consider the Supreme Court opinion in *People v. Walker* (1976) 18 Cal.3d 232, 241–242 [133 Cal.Rptr. 520, 555 P.2d 306], which held that an enhancement does not provide for vicarious liability unless the underlying statute contains an explicit statement that vicarious liability is included within the statute's scope. Moreover, the Supreme Court has endorsed the *Reed* opinion and criticized the *Le* opinion, noting that *Le* also failed to consider the holding of *Walker*. (*People v. Piper* (1986) 42 Cal.3d 471, 477, fn. 5 [229 Cal.Rptr. 125, 772 P.2d 899].) Similarly, the Fifth Appellate District of the Court of Appeal has observed that "the weight of authority has endorsed the analysis in *Reed*" and rejected the holding of *Le*. (*People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392] [holding that Pen. Code, § 12022.3(a) & (b) does not include vicarious liability].) Thus, although no case has explicitly overruled *Fulton*, the holding of that case appears to be contrary to the weight of authority.

RELATED ISSUES

"Take"

As used in Penal Code section 12022.6, "take" does not have the same meaning as in the context of theft. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].) The defendant need not intend to permanently deprive the owner of the property so long as the defendant intends to take, damage, or destroy the property. *(Ibid.)* Moreover, the defendant need not actually steal the property but may "take" it in other ways. (*People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935 [204 Cal.Rptr. 179].) Thus, the enhancement may be applied to the crime of receiving stolen property *(ibid.)* and to the crime of driving a stolen vehicle (*People v. Kellett, supra,* 134 Cal.App.3d at pp. 958–959).

"Loss"

As used in Penal Code section 12022.6, "loss" does not require that the victim suffer an actual or permanent loss. (*People v. Bates* (1980) 113

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Cal.App.3d 481, 483–484 [169 Cal.Rptr. 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].) Thus, the enhancement may be imposed where the defendant had temporary possession of the stolen property but the property was recovered (*People v. Bates, supra,* 113 Cal.App.3d at pp. 483–484), and where the defendant attempted fraudulent wire transfers but the bank suffered no actual financial loss (*People v. Ramirez, supra,* 109 Cal.App.3d at pp. 539–540).

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3221. Aggravated White Collar Crime

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether the People have proved the additional allegation that the defendant engaged in a pattern of related felony conduct that involved the taking of more than $_____ <*insert amount alleged*>.

To prove this allegation, the People must prove that:

1. **The defendant committed two or more related felonies, specifically _____ <*insert names of alleged felonies and descriptions if necessary*>;**
2. **Fraud or embezzlement was a material element of at least two related felonies committed by the defendant;**
3. **The related felonies involved a pattern of related felony conduct;**

AND

4. **The pattern of related felony conduct involved the taking of more than $_____ <*insert amount alleged*>.**

A *pattern of related felony conduct* means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events.

***Related felonies* are felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.**

[Fraud is a material element of _____ <*insert name of alleged felony*>.]

[Embezzlement is a material element of _____ <*insert name of alleged felony*>.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the court has not otherwise instructed the jury on all the elements of the underlying felonies, the court must also give the appropriate instructions on those elements.

It is unclear if the court may instruct the jury that the fraud or embezzlement is a material element of the felonies. The bracketed sentences are provided for the court to use at its discretion.

AUTHORITY

- Enhancement. Pen. Code, § 186.11(a)(1).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 293.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.49 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[4][d], [f] (Matthew Bender).

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3222. Characteristics of Victim

If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime against a person who was (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **At the time of the crime, _____ <*insert name of alleged victim*> was (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic);**

AND

2. **At that time, the defendant knew or reasonably should have known that _____ <*insert name of alleged victim*> was (65 years of age or older/under the age of 14 years/ blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic).**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[*Developmentally disabled* means a severe, chronic disability of a person that:

1. **Is attributable to a mental or physical impairment or a combination of mental and physical impairments;**
2. **Is likely to continue indefinitely;**

AND

3. **Results in substantial functional limitation in three or more of the following abilities:**
   a. **To care for one's self;**
   b. **To understand and express language;**

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c. To learn;

d. To be independently mobile;

e. To engage in self-direction;

f. To live independently;

OR

g. To be economically self-sufficient.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged with a prior conviction under Penal Code section 667.9(b) or 667.10, the court must also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the prior or the court has granted a bifurcated trial on the prior conviction.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 866 P.2d 391].)

Give the bracketed definition of developmental disability if that enhancement is charged.

AUTHORITY

- Enhancements. Pen. Code, §§ 667.9(a) & (b), 667.10(a).
- Developmental Disability Defined. Pen. Code, § 667.9(d).
- Reasonably Should Have Known Not Unconstitutionally Vague. *People v. Smith* (1993) 13 Cal.App.4th 1182, 1188–1190 [16 Cal.Rptr.2d 820].

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- Prior Conviction Not Required for Enhancement Under Penal Code Section 667.9(a). *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1213 [38 Cal.Rptr.2d 592].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 306, 352.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.52 (Matthew Bender).

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I. TEMPLATES

3250. Enhancement, Sentencing Factor, or Specific Factual Issue: Template

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If you find the defendant guilty of the crime[s] charged in Count[s] ____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that _____ <*insert description of enhancement, sentencing factor, or factual issue*>. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

<INSERT ELEMENTS REQUIRED.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

This template is provided for the court to use for any enhancements, sentencing factors, or factual issues to be submitted to the jury that are not covered in previous instructions. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].)

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3251. Enhancement, Sentencing Factor, or Specific Factual Issue: Template—Bifurcated Trial

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The People have alleged that _____ <*insert description of enhancement, sentencing factor, or factual issue*>**.**

To prove this allegation, the People must prove that:

<*INSERT ELEMENTS REQUIRED.*>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

BENCH NOTES

Instructional Duty

This template is provided for the court to use for any enhancements, sentencing factors, or factual issues to be submitted to the jury that are not covered in previous instructions when the court grants a bifurcated trial on that issue. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].)

The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

When inserting the description in the first sentence, the court should specify which crimes the enhancement or sentencing factor pertains to if it applies to one or more specific counts. For example, "the victim of the robbery in Count 1 was particularly vulnerable."

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J. RELATED INSTRUCTIONS

3260. Duty of Jury: Verdict Form for Enhancement, Sentencing Factor, or Prior Conviction

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You have been given (a/____ <*insert number*>) verdict form[s] for the additional allegation[s]. If you reach a verdict on any additional allegation, complete the verdict form for that allegation.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when instructing on any enhancements, sentencing factors, prior convictions, or other special findings.

Do not give this instruction for special circumstances. Give CALCRIM No. 700, *Special Circumstances: Introduction*.

AUTHORITY

- Statutory Authority. Pen. Code, §§ 1158, 1158a.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.31, 91.102[3] (Matthew Bender).

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3261. During Commission of Felony: Defined—Escape Rule

The People must prove that _____ <*insert allegation, e.g., the defendant personally used a firearm*> **in the commission [or attempted commission] of** _____ <*insert felony or felonies*>**.**

<*Give one or more bracketed paragraphs below depending on crime[s] alleged.*>

<*Robbery*>

[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety.

The perpetrator[s] (has/have) reached a temporary place of safety if:

- **(He/She/They) (has/have) successfully escaped from the scene; [and]**
- **(He/She/They) (is/are) no longer being chased(; [and]/.)**
- **[(He/She/They) (has/have) unchallenged possession of the property(; [and]/.)]**
- **[(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]**

<*Burglary*>

[The crime of burglary [or attempted burglary] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[, and (has/have) unchallenged possession of the property].]

<*Sexual Assault*>

[The crime of _____ <*insert sexual assault alleged*> **[or attempted** _____ <*insert sexual assault alleged*>**] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully**

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escaped from the scene[,] [and] (is/are) no longer being chased[, and (is/are) no longer in continuous physical control of the person who was the target of the crime].]

<Kidnapping>

[The crime of kidnapping [or attempted kidnapping] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene, (is/are) no longer being chased, and (is/are) no longer in continuous physical control of the person kidnapped.]

<Other Felony>

[The crime of _____ *<insert felony alleged>* **[or attempted** _____ *<insert felony alleged>*] **continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene and (is/are) no longer being chased.]**

BENCH NOTES

Instructional Duty

Give this instruction whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required some act "during the commission or attempted commission" of the felony. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 208 [14 Cal.Rptr.3d 281, 91 P.3d 222].)

In *People v. Cavitt* (2004) 33 Cal.4th 187, *supra* at p. 208, the Court explained the "escape rule" and distinguished this rule from the "continuous-transaction" doctrine:

> [W]e first recognize that we are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. The "escape rule" defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary

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> safety. [Citation.] The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. [Citations.] . . .

(*Ibid.* [italics in original].)

This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court should give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. This instruction should only be given if it is required to explain the duration of the felony for other ancillary purposes, such as use of a weapon.

Similarly, this instruction should **not** be given if the issue is when the defendant formed the intent to aid and abet a robbery or a burglary. For robbery, give CALCRIM No. 1603, *Robbery: Intent of Aider and Abettor*. For burglary, give CALCRIM No. 1702, *Burglary: Intent of Aider and Abettor*.

AUTHORITY

- Escape Rule. *People v. Cavitt* (2004) 33 Cal.4th 187, 208–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Temporary Place of Safety. *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [17 Cal.Rptr.2d 23].
- Continuous Control of Victim. *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857] [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [23 Cal.Rptr.2d 888] [robbery].
- Robbery. *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1170 [282 Cal.Rptr. 450, 811 P.2d 742].
- Burglary. *People v. Bodely* (1995) 32 Cal.App.4th 311, 313–314 [38 Cal.Rptr.2d 72].
- Lewd Acts on Child. *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857].
- Sexual Assault. *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289].

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- Kidnapping. *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [280 Cal.Rptr. 584]; *People v. Silva* (1988) 45 Cal.3d 604, 632 [247 Cal.Rptr. 573, 754 P.2d 1070].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[2][b][v], 142.10[1][b] (Matthew Bender).

RELATED ISSUES

Temporary Place of Safety Based on Objective Standard

Whether the defendant had reached a temporary place of safety is judged on an objective standard. The "issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].)

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DEFENSES AND INSANITY

A. GENERAL DEFENSES

3400. Alibi
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3402. Duress or Threats
3403. Necessity
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B. IMPAIRMENT DEFENSES

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D. SELF-DEFENSE AND DEFENSE OF ANOTHER

3470. Right to Self-Defense or Defense of Another (Non-Homicide)
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3476. Right to Defend Real or Personal Property
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A. GENERAL DEFENSES

3400. Alibi

The People must prove that the defendant committed _____ <*insert crime[s] charged*>. The defendant contends (he/she) did not commit (this/these) crime(s) and that (he/she) was somewhere else when the crime[s] (was/were) committed. The People must prove that the defendant was present and committed the crime[s] with which (he/she) is charged. The defendant does not need to prove (he/she) was elsewhere at the time of the crime.

If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find (him/her) not guilty.

[However, the defendant may also be guilty of _____ <*insert crime[s] charged*> if (he/she) (aided and abetted/ [or] conspired with) someone else to commit (that/those) crime[s]. If you conclude that the defendant (aided and abetted/ [or] conspired to commit) _____ <*insert crime[s] charged*>, then (he/she) is guilty even if (he/she) was not present when the crime[s] (was/were) committed.]

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on alibi. (*People v. Freeman* (1978) 22 Cal.3d 434, 437–438 [149 Cal.Rptr. 396, 584 P.2d 533]; *People v. Alcala* (1992) 4 Cal.4th 742, 803–804 [15 Cal.Rptr.2d 432, 842 P.2d 1192].) The court must give this instruction on request when evidence of alibi has been introduced. (*People v. Whitson* (1944) 25 Cal.2d 593, 603 [154 P.2d 867] [no sua sponte duty even if substantial evidence has been introduced by the defense]; *People v. Freeman* (1978) 22 Cal.3d 434, 437–438 [149 Cal.Rptr. 396, 584 P.2d 533].)

The defendant is not entitled to an instruction on alibi if the prosecution does not rely on the defendant's presence at the commission of the crime

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to establish culpability. (*People v. Manson* (1976) 61 Cal.App.3d 102, 211 [132 Cal.Rptr. 265] [in prosecution for conspiracy and murder, defendant was not entitled to a jury instruction on alibi, where the prosecution never contended he was present at the time of the actual commission of any homicide and his presence was not a requirement for culpability].)

If the prosecution's theory is that the defendant aided and abetted or conspired with the perpetrator but was not present when the crime was committed, give the last bracketed paragraph that begins with "However, the defendant may also be guilty." (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 26–28 [272 Cal.Rptr. 34].) If this paragraph is given, the court has a **sua sponte** duty to instruct on aiding and abetting. (*Ibid.* [court properly instructed that alibi was not a defense in an aiding and abetting case, but erred in failing to define aiding and abetting].)

AUTHORITY

- Burden of Proof. *In re Corey* (1964) 230 Cal.App.2d 813, 828 [41 Cal.Rptr. 379].
- Alibi, Aiding and Abetting. *People v. Sarkis* (1990) 222 Cal.App.3d 23, 26–28 [272 Cal.Rptr. 34].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 616–639.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.10 (Matthew Bender).

RELATED ISSUES

Defendant Need Not Prove Alibi, Only Raise Reasonable Doubt

Alibi evidence need only raise a reasonable doubt that the defendant was not present at the scene of the crime. It is therefore error to instruct the jury (1) that an alibi must be proved by a preponderance of the evidence, (2) that alibi evidence must convince the jury of the defendant's innocence, (3) that the jury must give less credit to the testimony of alibi witnesses, or (4) that the jury must give more careful scrutiny or less weight to alibi evidence than to other evidence. (*People v. Costello* (1943) 21 Cal.2d 760, 763 [135 P.2d 164].)

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3402. Duress or Threats

The defendant is not guilty of _____<*insert crime[s]*> if (he/she) acted under duress. The defendant acted under duress if, because of threat or menace, (he/she) believed that (his/her/ [or] someone else's) life would be in immediate danger if (he/she) refused a demand or request to commit the crime[s]. The demand or request may have been express or implied.

The defendant's belief that (his/her/ [or] someone else's) life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

A threat of future harm is not sufficient; the danger to life must have been immediate.

The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime[s]*>.

[This defense does not apply to the crime of _____<*insert charge[s] of murder; see Bench Notes*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on this defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally]; *People v. Sedeno* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], overruled by *Breverman, supra*, on a different point; see also *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579] [no sua sponte duty because evidence did not support complete duress].)

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As provided by statute, duress is not a defense to crimes punishable by death. (Pen. Code, § 26(6); *People v. Anderson* (2002) 28 Cal.4th 767, 780 [122 Cal.Rptr.2d 587, 50 P.3d 368] [duress is not a defense to any form of murder].) If such a crime is charged, the court should instruct, using the last bracketed paragraph, that the defense is not applicable to that count. However, "duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*Id.* at p. 784.) If the defendant is charged with felony-murder, the court should instruct that the defense of duress does apply to the underlying felony.

Related Instructions

The defense of duress applies when the threat of danger is immediate and accompanied by a demand, either direct or implied, to commit the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 899–901 [255 Cal.Rptr. 120]; *People v. Steele* (1988) 206 Cal.App.3d 703, 706 [253 Cal.Rptr. 773].) If the threat is of future harm or there is no implicit or explicit demand that the defendant commit the crime, the evidence may support instructing on the defense of necessity. (See CALCRIM No. 3403, *Necessity*.)

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(6).
- Burden of Proof. *People v. Graham* (1976) 57 Cal.App.3d 238, 240 [129 Cal.Rptr. 31].
- Difference Between Necessity and Duress. *People v. Heath* (1989) 207 Cal.App.3d 892, 897–902 [255 Cal.Rptr. 120].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 53–54.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05[1] (Matthew Bender).

RELATED ISSUES

Necessity Distinguished

Although evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant

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to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009–1013 [138 Cal.Rptr. 515].) Necessity does not negate any element of the crime, but rather represents a public policy decision not to punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid.*)

Duress Cannot Reduce Murder to Manslaughter

Duress cannot reduce murder to manslaughter. (*People v. Anderson* (2002) 28 Cal.4th 767, 783(785 [122 Cal.Rptr.2d 587, 50 P.3d 368] [only the Legislature can recognize killing under duress as new form of manslaughter].)

Mental State or Intent

Evidence of duress may be relevant to determining whether the defendant acted with the required mental state, even if insufficient to constitute a complete defense. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99–100 [17 Cal.Rptr.3d 710, 96 P.3d 30] [noting that court properly instructed that duress may be considered on the question of whether the defendant acted with the proper mental state].)

Great Bodily Harm

Penal Code section 26(6) discusses life-endangering threats and several older cases have outlined the defense of duress in the literal language of the statute. However, some cases have concluded that fear of great bodily harm is sufficient to raise this defense. (Compare *People v. Hart* (1950) 98 Cal.App.2d 514, 516 [220 P.2d 595] and *People v. Lindstrom* (1932) 128 Cal.App. 111, 116 [16 P.2d 1003] with *People v. Otis* (1959) 174 Cal.App.2d 119, 124 [344 P.2d 342]; see also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 59 [discussing this split]; but see *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579] [court rejects defense of duress because evidence showed defendant feared only a beating].) It is clear, however, that threats of great bodily harm are sufficient in the context of necessity. (*People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831 [118 Cal.Rptr. 110]; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 27 [197 Cal.Rptr. 264].)

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Third Person Threatened

In *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 21–25 [197 Cal.Rptr. 264], the court held that the defenses of necessity and duress may be based on threats of harm to a third party. Although *Pena* is regarded as a necessity case, its discussion of this point was based on out-of-state and secondary authority involving the defense of duress. (See *People v. Heath* (1989) 207 Cal.App.3d 892, 898 [255 Cal.Rptr. 120] [acknowledging that though *Pena* uses the terms necessity and duress interchangeably, it is really concerned with the defense of necessity].) No other California cases discuss threats made to a third party and duress. (See also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 60 [discussing *Pena* on this point].)

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3403. Necessity

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted because of legal necessity.

In order to establish this defense, the defendant must prove that:

1. **(He/She) acted in an emergency to prevent a significant bodily harm or evil to (himself/herself/ [or] someone else);**
2. **(He/She) had no adequate legal alternative;**
3. **The defendant's acts did not create a greater danger than the one avoided;**
4. **When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil;**
5. **A reasonable person would also have believed that the act was necessary under the circumstances;**

AND

6. **The defendant did not substantially contribute to the emergency.**

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on necessity when there is sufficient evidence supporting each of the factors establishing the defense. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [48 Cal.Rptr.2d 877] [no duty to instruct sua sponte where evidence did not, as a matter of law, support this defense]; see *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [871 Cal.Rptr.2d 535] [defendant requested instruction on necessity and

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court, citing *Pepper, supra,* held that "an instruction on necessity was required," where sufficient evidence established the defense].)

Related Instructions

If the threatened harm was immediate and accompanied by a demand to commit the crime, the defense of duress may apply. (See CALCRIM No, 3402, *Duress or Threats*.)

AUTHORITY

- Instructional Requirements. *People v. Pena* (1983) 149 Cal.App.3d Supp. 14 [197 Cal.Rptr. 264]; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [48 Cal.Rptr.2d 877]; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135–1136 [64 Cal.Rptr. 2d 654].
- Burden of Proof. *People v. Waters* (1985) 163 Cal.App.3d 935, 938 [209 Cal.Rptr. 661]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008 [138 Cal.Rptr. 515].
- Difference Between Necessity and Duress. *People v. Heath* (1989) 207 Cal.App.3d 892, 897–902 [255 Cal.Rptr. 120].

Secondary Sources

1 Witkin and Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 55–60.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.05[2], 73.18 (Matthew Bender).

RELATED ISSUES

Duress Distinguished

Although a defendant's evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009–1013 [138 Cal.Rptr. 515].) Necessity does not negate any element of the crime, but rather represents a public policy decision not to punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid.*)

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Abortion Protests

The defense of necessity is not available to one who attempts to interfere with another person's exercise of a constitutional right (e.g., demonstrators at an abortion clinic). (*People v. Garziano* (1991) 230 Cal.App.3d 241, 244 [281 Cal.Rptr. 307].)

Economic Necessity

Necessity caused by economic factors is valid under the doctrine. A homeless man was entitled to an instruction on necessity as a defense to violating an ordinance prohibiting sleeping in park areas. Lack of sleep is arguably a significant evil and his lack of economic resources prevented a legal alternative to sleeping outside. (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389–391 [81 Cal.Rptr.2d 535].)

Medical Necessity

There is a common law and statutory defense of medical necessity. The common law defense contains the same requirements as the general necessity defense. (See *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538 [66 Cal.Rptr.2d 559].) The statutory defense relates specifically to the use of marijuana and is based on Health and Safety Code section 11362.5, the "Compassionate Use Act," but see *Gonzales v. Raich* (2005) 545 U.S. __ [125 S.Ct. 2195, 162 L.Ed.2d 1] [medical necessity defense not available].

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3404. Accident

<General or Specific Intent Crimes>

[The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]

<Criminal Negligence Crimes>

[The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] accidentally without criminal negligence. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with criminal negligence. *Criminal negligence* is defined in another instruction.]

BENCH NOTES

Instructional Duty

There is no **sua sponte** duty to instruct on accident; however; the court must give this instruction on request when evidence of accident or misfortune has been introduced. (*People v. Acosta* (1955) 45 Cal.2d 538, 544 [290 P.2d 1].)

When instructing on the defense of accident and misfortune, only the mental state relevant to the crime charged should be included in the instruction. (*People v. Lara* (1996) 44 Cal.App.4th 102, 109 [51 Cal.Rptr.2d 402] [trial court erred in instructing on criminal negligence in battery case because battery is a general intent crime].) Give the first paragraph if the defense is raised to a general or specific intent crime. Give the second paragraph if the defense is raised to a crime that is committed by criminal negligence. In either case, the court should insert the specific crime in the space provided. If both intent and negligence crimes are charged, instruct with both paragraphs.

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Related Instructions

If murder is charged, see CALCRIM No. 510, *Excusable Homicide: Accidental*.

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 26(5), 195.
- Burden of Proof. *People v. Black* (1951) 103 Cal.App.2d 69, 79 [229 P.2d 61]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Misfortune as Accident. *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 241.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[5] (Matthew Bender).

RELATED ISSUES

Misfortune Defined

" 'Misfortune' when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act." (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].)

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3405. Parental Right to Punish a Child

A (parent/guardian/_____ <*insert title of other person legally permitted to discipline the child*>) is not guilty of _____ <*insert crime*> if (he/she) used (justifiable physical force/ [(a/or) another] justifiable method) to discipline a child. (Physical force/ [or] _____ <*insert other method of punishment*>) is justifiable if a reasonable person would find that punishment was necessary under the circumstances and that the (physical force/ [or] method) used was reasonable.

The People must prove beyond a reasonable doubt that the (force/ [or] method of punishment) used was not justifiable. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime*>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the right of a parent to discipline a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].)

AUTHORITY

- Instructional Requirements. *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049–1051 [12 Cal.Rptr.2d 33].
- Lawful Forms of Discipline. *People v. Checketts* (1999) 71 Cal.App.4th 1190, 1194 [84 Cal.Rptr.2d 491].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 165.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.13[2][a], 142.23[7] (Matthew Bender).

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RELATED ISSUES

Confinement

Reasonable acts of discipline include confinement to a particular location for disciplinary purposes. However, confining a child for an unlawful purpose or with the intent to endanger the child's health and safety is not a reasonable exercise of parental authority. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1194, 1195 [84 Cal.Rptr.2d 491].)

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3406. Mistake of Fact

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <*insert crime[s]*>.

If you find that the defendant believed that _____ <*insert alleged mistaken facts*> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____ <*insert crime[s]*>.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <*insert crime[s]*>, you must find (him/her) not guilty of (that crime/those crimes).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on mistake of fact if substantial evidence supports this defense. (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1018 [250 Cal.Rptr. 354].) This instruction also must be given on request, if supported by the evidence. (*People v. Goodman* (1970) 8 Cal.App.3d 705, 709 [87 Cal.Rptr. 665], disapproved on other grounds by *People v. Beagle* (1972) 6 Cal.3d 441, 452 [99 Cal.Rptr. 313, 492 P.2d 1].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the intent at issue is specific criminal intent, do not use the bracketed language requiring the belief to be reasonable.

Mistake of fact is not a defense to the following crimes under the circumstances described below:

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1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing marijuana to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 288a(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(3).
- Burden of Proof. *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr. 745, 542 P.2d 1337].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06 (Matthew Bender).

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on

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mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

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3407. Defenses: Mistake of Law

It is not a defense to the crime[s] of _____ <*insert crime[s]*> that the defendant did not know (he/she) was breaking the law or that (he/she) believed (his/her) act was lawful.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. It is no defense to a crime that the defendant did not realize he or she was breaking the law when he or she acted. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819].) This is true even when the defendant claims he or she was acting in good faith on the mistaken advice of counsel. (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42] [defendant's mistaken belief, based on attorney's advice, that prior conviction was a misdemeanor no defense to felon in possession of a firearm]; *People v. McCalla* (1923) 63 Cal.App. 783, 795 [220 P. 436], disapproved on other grounds by *People v. Elliot* (1960) 59 Cal.2d 498 [6 Cal.Rptr. 753, 354 P.2d 225]; *People v. Honig* (1996) 48 Cal.App.4th 289, 347–348 [55 Cal.Rptr.2d 555]; *People v. Smith* (1966) 63 Cal.2d 779, 792–793 [48 Cal.Rptr. 382, 409 P.2d 222] [no defense to felony murder that defendant did not know that entering a store intending to pass a forged check constituted burglary in California].)

The court should, however, exercise caution with specific intent crimes. A mistaken belief about legal status or rights may be a defense to a specific intent crime if the mistake is held in good faith. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819] [defendants' belief that they had a legal right to use clients' gold reserves to buy future contracts could be a defense if held in good faith]; (*People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 549 P.2d 1317] [defendant's good faith belief that he was legally authorized to use property could be defense to embezzlement]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17] [defendant's belief, if held in good faith, that out-of-state custody order was not enforceable in California could have been basis for defense to violating a child custody order]; see also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 37.) Although concerned with knowledge of the law, a mistake about legal

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status or rights is a mistake of fact, not a mistake of law. (See CALCRIM No. 3406, *Mistake of Fact*.)

AUTHORITY

- Instructional Requirements. *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 37–38.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.07 (Matthew Bender).

RELATED ISSUES

Good Faith Reliance on Statute or Regulation

Good faith reliance on a facially valid statute or administrative regulation (which turns out to be void) may be considered an excusable mistake of law. Additionally, a good faith mistake-of-law defense may be established by special statute. (See 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 38.)

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3408. Entrapment

Entrapment is a defense. The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard from proof beyond a reasonable doubt. To meet this burden, the defendant must prove that it is more likely than not that (he/she) was entrapped.

A person is entrapped if a law enforcement officer [or (his/her) agent] engaged in conduct that would cause a normally law-abiding person to commit the crime.

Some examples of entrapment might include conduct like badgering, persuasion by flattery or coaxing, repeated and insistent requests, or an appeal to friendship or sympathy.

Another example of entrapment would be conduct that would make commission of the crime unusually attractive to a normally law-abiding person. Such conduct might include a guarantee that the act is not illegal or that the offense would go undetected, an offer of extraordinary benefit, or other similar conduct.

If an officer [or (his/her) agent] simply gave the defendant an opportunity to commit the crime or merely tried to gain the defendant's confidence through reasonable and restrained steps, that conduct is not entrapment.

In evaluating this defense, you should focus primarily on the conduct of the officer. However, in deciding whether the officer's conduct was likely to cause a normally law-abiding person to commit this crime, also consider other relevant circumstances, including events that happened before the crime, the defendant's responses to the officer's urging, the seriousness of the crime, and how difficult it would have been for law enforcement officers to discover that the crime had been committed.

When deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation. Do not consider the defendant's particular intentions or character, or whether the defendant had a predisposition to commit the crime.

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[As used here, an *agent* is a person who does something at the request, suggestion, or direction of an officer. It is not necessary that the agent know the officer's true identity, or that the agent realize that he or she is actually acting as an agent.]

If the defendant has proved that it is more likely than not that (he/she) _____ <*insert charged crime, e.g., committed embezzlement*> because (he/she) was entrapped, you must find (him/her) not guilty of _____ <*insert charged crime*>.

BENCH NOTES

Instructional Duty

The trial court has a **sua sponte** duty to instruct on entrapment if there is substantial evidence supporting the defense or it appears that the defendant is relying on such a defense. (*People v. Watson* (2000) 22 Cal.4th 220, 222 [91 Cal.Rptr.2d 822, 990 P.2d 1031]; *People v. McIntire* (1979) 23 Cal.3d 742, 745 [153 Cal.Rptr. 237, 591 P.2d 527]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].) This instruction must also be given on request when there is sufficient evidence. (*People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1], superseded by statute on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768 [30 Cal.Rptr.2d 33, 872 P.2d 574].)

Give the bracketed definition of an agent if agency is an issue.

In the last paragraph, enter a phrase with a verb in the first blank to state what the defendant did (e.g., "committed embezzlement" or "sold cocaine"). Enter the crime(s) in the second blank (e.g., "embezzlement" or "sale of a controlled substance").

AUTHORITY

- Instructional Requirements. *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232 [271 Cal.Rptr. 467]; *People v. Barraza* (1979) 23 Cal.3d 675, 689–691 [153 Cal.Rptr. 459, 591 P.2d 947].
- Burden of Proof. *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232 [271 Cal.Rptr. 467]; *People v. Peppars* (1983) 140 Cal.App.3d 677, 684 [189 Cal.Rptr. 879]; *People v. Barraza* (1979) 23 Cal.3d 675, 691, fn. 6 [153 Cal.Rptr. 459, 591 P.2d 947]; *In re Foss* (1974) 10 Cal.3d 910, 930–931 [112 Cal.Rptr. 649, 519 P.2d 1073].

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- Definition of Agent. *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 90–102.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.08, 73.18 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10[2][c] (Matthew Bender).

RELATED ISSUES

Decoy Programs Permitted

The use of "ruses, stings, and decoys" to expose illicit activity does not constitute entrapment, as long as no pressure or overbearing conduct is employed by the decoy. (*Provigo Corp. v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561, 568–570 [28 Cal.Rptr.2d 638, 869 P.2d 1163] [use of underage, but mature-looking, decoys to expose unlawful sales of alcoholic beverages to minors not entrapment; no pressure or overbearing conduct occurred, and targets could have protected themselves by routinely checking customer IDs].) The conduct of an unwitting decoy may also constitute sufficient badgering, cajoling, or importuning that entitles the defendant to an entrapment instruction. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1096–1098.)

Multiple Defenses Permitted

A defendant may assert entrapment and still deny guilt. (*People v. Perez* (1965) 62 Cal.2d 769, 775–776 [44 Cal.Rptr. 326, 401 P.2d 934].) "Although the defense of entrapment is available to a defendant who is otherwise guilty [citation], it does not follow that the defendant must admit guilt to establish the defense. A defendant, for example, may deny that he committed every element of the crime charged, yet properly allege that such acts as he did commit were induced by law enforcement officers [citation]." (*Ibid.*)

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3409. When Conduct of Officer May Not Be Attributed to Defendant

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If, while acting for a law enforcement purpose, an officer [or (his/her) agent] pretends to be an accomplice of a defendant, then no act done by the officer [or agent] may be attributed to the defendant or held against the defendant, unless the defendant, using (his/her) independent will, directed the officer [or agent] to do the act.

[As used in this instruction, an *agent* is a person who does something at the request, suggestion, or direction of an officer. It is not necessary that the agent know the officer's true identity, or that the agent realize that he or she is acting as an agent.]

BENCH NOTES

Instructional Duty

Give this instruction on request if supported by the evidence. (*People v. Goldberg* (1957) 152 Cal.App.2d 562 [314 P.2d 151]; *People v. Lanzit* (1925) 70 Cal.App. 498, 509 [233 P. 816].)

AUTHORITY

- Case Law. *People v. Goldberg* (1957) 152 Cal.App.2d 562 [314 P.2d 151]; *People v. Lanzit* (1925) 70 Cal.App. 498, 509 [233 P. 816].
- Agent Defined. *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.08 (Matthew Bender).

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3410. Statute of Limitations

A defendant may not be convicted of _____ <*insert crime[s]*> unless the prosecution began within ____ years of the date the crime[s] ((was/were) committed/(was/were) discovered/should have been discovered). The present prosecution began on _____ <*insert date*>.

[A crime *should have been discovered* when the (victim/law enforcement officer) was aware of facts that would have alerted a reasonably diligent (person/law enforcement officer) in the same circumstances to the fact that a crime may have been committed.]

The People have the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that prosecution of this case began within the required time. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime[s]*>.

[If the People have proved that it is more likely than not that the defendant was outside of California for some period of time, you must not include that period [up to three years] in determining whether the prosecution began on time.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the statute of limitations if the defendant is relying on such a defense or there is substantial evidence supporting it. (See generally *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317] [discussing duty to instruct on defenses].)

The state has the burden of proving by a preponderance of the evidence that the prosecution is not barred by the statute of limitations. (*People v. Crosby* (1962) 58 Cal.2d 713, 725 [25 Cal.Rptr. 847, 375 P.2d 839].)

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For most crimes, the statute begins to run when the offense is committed. If the crime is a fraud-related offense and included in Penal Code section 803, the statute begins to run after the completion of or discovery of the offense, whichever is later. (Pen. Code, §§ 801.5, 803.) Courts interpreting the date of discovery provision have imposed a due diligence requirement on investigative efforts. (*People v. Zamora* (1976) 18 Cal.3d 538, 561 [134 Cal.Rptr. 784, 557 P.2d 75]; *People v. Lopez* (1997) 52 Cal.App.4th 233, 246 [60 Cal.Rptr.2d 511].) If one of the crimes listed in Section 803 is at issue, the court should instruct using the "discovery" language.

If there is a factual issue about when the prosecution started, the court should instruct that the prosecution begins when (1) an information or indictment is filed, (2) a complaint is filed charging a misdemeanor or infraction, (3) a case is certified to superior court, or (4) an arrest warrant or bench warrant is issued describing the defendant with the same degree of particularity required for an indictment, information, or complaint. (Pen. Code, § 804.)

Limitation Periods

No limitations period (Pen. Code, § 799):

> Embezzlement of public funds and crimes punishable by death or by life imprisonment.

Six-year period (Pen. Code, § 800):

> Felonies punishable for eight years or more, unless otherwise specified by statute.

Five-year period (Pen. Code, § 801.6):

> All other crimes against elders and dependent adults.

Four-year period (Pen. Code, §§ 801.5, 803(c)):

> Fraud, breach of fiduciary obligation, theft, or embezzlement on an elder or dependent adult, and misconduct in office.

Three-year period (Pen. Code, § 801, 802(b)):

> All other felonies, unless otherwise specified by statute, and misdemeanors committed upon a minor under the age of 14. Note: "If the offense is an alternative felony/misdemeanor 'wobbler' initially charged as a felony, the three-year statute of limitations applies, without regard to the ultimate reduction to a misdemeanor after the

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filing of the complaint [citation]." (*People v. Mincey* (1992) 2 Cal.4th 408, 453 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Two-year period (Pen. Code, § 802(c)):

Misdemeanors under Business and Professions Code section 729.

One-year period (Pen. Code, § 802(a)):

Misdemeanors. Note: "If the initial charge is a felony but the defendant is convicted of a necessarily included misdemeanor, the one-year period for misdemeanors applies." (*People v. Mincey* (1992) 2 Cal.4th 408, 453 [6 Cal.Rptr.2d 822, 827 P.2d 388]; Pen. Code, § 805(b); see also 1 Witkin & Epstein, California. Criminal Law (3d ed. 2000) Defenses, § 220.)

AUTHORITY

- Instructional Requirements. Pen. Code, § 799 et seq.; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].
- Tolling the Statute. Pen. Code, § 803.
- Burden of Proof. *People v. Lopez* (1997) 52 Cal.App.4th 233, 250 [60 Cal.Rptr.2d 111]; *People v. Zamora* (1976) 18 Cal.3d 538, 565 [134 Cal.Rptr. 784, 557 P.2d 75]; *People v. Crosby* (1962) 58 Cal.2d 713, 725 [25 Cal.Rptr. 847, 375 P.2d 839].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 214–228.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings,* § 40.09 (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.09 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Burden of Proof

At trial, the prosecutor bears the burden of proving by a preponderance of the evidence that the prosecution began within the required time. However,

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at a pre-trial motion to dismiss, the defendant has the burden of proving that the statute of limitations has run as a matter of law. (*People v. Lopez* (1997) 52 Cal.App.4th 233, 249–251 [60 Cal.Rptr.2d 511].) The defendant is entitled to prevail on the motion only if there is no triable issue of fact. (*Id.* at p. 249.)

Computation of Time

To determine the exact date the statute began to run, exclude the day the crime was completed. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [134 Cal.Rptr. 784, 557 P.2d 75].)

Felony Murder

Felony-murder charges and felony-murder special circumstances allegations may be filed even though the statute of limitations has run on the underlying felony. (*People v. Morris* (1988) 46 Cal.3d 1, 14–18 [249 Cal.Rptr. 119, 756 P.2d 843], disapproved of on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535 [37 Cal.Rptr.2d 446, 887 P.2d 527].)

Offense Completed

When an offense continues over a period of time, the statutory period usually does not begin until after the last overt act or omission occurs. (*People v. Zamora* (1976) 18 Cal.3d 538, 548 [134 Cal.Rptr. 784, 557 P.2d 75] [last act of conspiracy to burn insured's property was when fire was ignited and crime was completed; last act of grand theft was last insurance payment].)

Waiving the Statute of Limitations

A defendant may affirmatively, but not inadvertently, waive the statute of limitations. (*People v. Williams* (1999) 21 Cal.4th 335, 338, 340–342 [87 Cal.Rptr.2d 412, 981 P.2d 42]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1089–1090 [130 Cal.Rptr.2d 717] [defendant did not request or acquiesce to instruction on time-barred lesser included offense].)

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B. IMPAIRMENT DEFENSES

3425. Unconsciousness

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.]

Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] sleepwalking[,]/ or _____ <*insert a similar condition*>).

The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on unconsciousness if the defendant is relying on this defense or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally]; *People v. Sedeno* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913] [duty to instruct on unconsciousness], overruled by *Breverman*, *supra*, 19 Cal.4th 142, on different grounds.)

Because there is a presumption that a person who appears conscious is conscious (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64 [198 P.2d 865]), the defendant must produce sufficient evidence raising a reasonable doubt

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that he or she was conscious before an instruction on unconsciousness may be given. (*Ibid.*; *People v. Kitt* (1978) 83 Cal.App.3d 834, 842 [14 Cal.Rptr. 447], disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865] [presumption of consciousness goes to the defendant's burden of producing evidence].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(4); *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].
- Burden of Proof. Pen. Code, § 607; *People v. Hardy* (1948) 33 Cal.2d 52, 64 [198 P.2d 865]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 330–331 [147 Cal.Rptr. 740].
- Unconsciousness Defined. *People v. Newton* (1970) 8 Cal.App.3d 359, 376 [87 Cal.Rptr. 394]; *People v. Heffington* (1973) 32 Cal.App.3d 1, 9 [107 Cal.Rptr. 859].
- Unconscious State: Blackouts. *People v. Cox* (1944) 67 Cal.App.2d 166, 172 [153 P.2d 362].
- Unconscious State: Epileptic Seizures. *People v. Freeman* (1943) 61 Cal.App.2d 110, 115–116 [142 P.2d 435].
- Unconscious State: Involuntary Intoxication. *People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859]; see *People v. Hughes* (2002) 27 Cal.4th 287, 343–344 [116 Cal.Rptr.2d 401, 39 P.3d 432] [jury was adequately informed that unconsciousness does not require that person be incapable of movement].
- Unconscious State: Somnambulism or Delirium. *People v. Methever* (1901) 132 Cal. 326, 329 [64 P. 481], overruled on other grounds in *People v. Gorshen* (1953) 51 Cal.2d 716 [336 P.2d 492].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d Ed. 2000) *Defenses*, §§ 31, 34.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[4] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

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COMMENTARY

The committee did not include an instruction on the presumption of consciousness. There is a judicially created presumption that a person who acts conscious is conscious. (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64 [198 P.2d 865].) Although an instruction on this presumption has been approved, it has been highly criticized. (See *People v. Kitt* (1978) 83 Cal.App.3d 834, 842–843 [148 Cal.Rptr. 447], disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865] [acknowledging instruction and suggesting modification]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 332 [147 Cal.Rptr. 740] [criticizing instruction for failing to adequately explain the presumption].)

The effect of this presumption is to place on the defendant a burden of producing evidence to dispel the presumption. (*People v. Cruz, supra,* 83 Cal.App.3d at pp. 330–331; *People v. Kitt, supra,* 83 Cal.App.3d at p. 842, disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865]; and see *People v. Babbitt* (1988) 45 Cal.3d 660, 689–696 [248 Cal.Rptr. 69, 755 P.2d 253] [an instruction on this presumption "did little more than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness and apply it to the issue."].) However, if the defendant produces enough evidence to warrant an instruction on unconsciousness, the rebuttable presumption of consciousness has been dispelled and no instruction on its effect is necessary. The committee, therefore, concluded that no instruction on the presumption of consciousness was needed.

RELATED ISSUES

Inability to Remember

Generally, a defendant's inability to remember or his hazy recollection does not supply an evidentiary foundation for a jury instruction on unconsciousness. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 10 [107 Cal.Rptr. 859]); *People v. Sameniego* (1931) 118 Cal.App. 165, 173 [4 P.2d 809] ["The inability of a defendant . . . to remember . . . is of such common occurrence and so naturally accountable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise not even a suspicion of declarations having been made while in an unconscious condition."].) In *People v. Coston* (1947) 82 Cal.App.2d 23, 40–41 [185 P.2d 632], the court stated that forgetfulness may be a factor in unconsciousness; however, "there must be something

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more than [the defendant's] mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act."

Two cases have held that a defendant's inability to remember warrants an instruction on unconsciousness. (*People v. Bridgehouse* (1956) 47 Cal.2d 406, 414 [303 P.2d 1018] and *People v. Wilson* (1967) 66 Cal.2d 749, 761–762 [59 Cal.Rptr. 156, 427 P.2d 820].) Both cases were discussed in *People v. Heffington* (1973) 32 Cal.App.3d 1 [107 Cal.Rptr. 859], but the court declined to hold that *Bridgehouse* and *Wilson* announced an "ineluctable rule of law" that "a defendant's inability to remember or his 'hazy' recollection supplies an evidentiary foundation for a jury instruction on unconsciousness." (*Id.* at p. 10.) The court stated that, "[b]oth [cases] were individualized decisions in which the court examined the record and found evidence, no matter how incredible, warranting the instruction." (*Ibid.*)

Intoxication–Involuntary versus Voluntary

Unconsciousness due to involuntary intoxication is a complete defense to a criminal charge under Penal Code section 26, subdivision (4). (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness due to voluntary intoxication is governed by Penal Code section 22, rather than section 26, and is not a defense to a general intent crime. (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 855 [30 Cal.Rptr.2d 757; see CALCRIM No. 3426, *Voluntary Intoxication*.)

Mental Condition

A number of authorities have stated that a conflict exists in California over whether an unsound mental condition can form the basis of a defense of unconsciousness. (See *People v. Lisnow* (1978) 88 Cal.App.3d Supp. 21, 23 [151 Cal.Rptr. 621]; 1 Witkin California Criminal Law (3d ed. 2000) Defenses, § 32 [noting the split and concluding that the more recent cases permit the defense for defendants of unsound mind]; Annot., Automatism or Unconsciousness as a Defense or Criminal Charge (1984) 27 A.L.R.4th 1067, § 3(b) fn. 7.)

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3426. Voluntary Intoxication

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <*insert specific intent or mental state required, e.g., "the intent to permanently deprive the owner of his or her property" or "knowledge that . . ." or "the intent to do the act required"*>**.**

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

[Do not consider evidence of intoxication in deciding whether _____ <*insert non-target offense*> **was a natural and probable consequence of** _____ <*insert target offense*>**.]**

In connection with the charge of _____ <*insert first charged offense requiring specific intent or mental state*> **the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with** _____ <*insert specific intent or mental state required, e.g., "the intent to permanently deprive the owner of his or her property" or "knowledge that . . ."*>**. If the People have not met this burden, you must find the defendant not guilty of** _____ <*insert first charged offense requiring specific intent or mental state*>**.**

<Repeat this paragraph for each offense requiring specific intent or a specific mental state.>

You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ <*insert general intent offense[s]*>**.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v.*

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Ricardi (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's required mental state. (Pen. Code, § 22; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1127–1128 [77 Cal.Rptr.2d 428, 959 P.2d 735]; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [104 Cal.Rptr.2d 738, 18 P.3d 660]; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [82 Cal.Rptr. 618, 462 P.2d 370] [applying specific v. general intent analysis and holding that assault type crimes are general intent; subsequently superceded by amendments to Penal Code Section 22 on a different point].)

If both specific and general intent crimes are charged, the court must specify the general intent crimes in the bracketed portion of the last sentence and instruct the jury that voluntary intoxication is not a defense to those crimes. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 399–402 [37 Cal.Rptr.2d 48]; *People v. Rivera* (1984) 162 Cal.App.3d 141, 145–146 [207 Cal.Rptr. 756].)

Give the bracketed paragraph beginning, "Do not consider evidence of intoxication," when instructing on aiding and abetting liability for a non-target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

Related Instructions

CALCRIM No. 3427, *Involuntary Intoxication*.

CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.

CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

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AUTHORITY

- Instructional Requirements. Pen. Code, § 22; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].

Secondary Sources

1 Witkin & Epstein, California Criminal Law 3d (2000) Defenses, § 26.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Implied Malice

"[E]vidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433], quoting *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6 [61 Cal.Rptr.2d 39].)

Intoxication Based on Mistake of Fact Is Involuntary

Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [194 Cal.Rptr. 633] [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Premeditation and Deliberation

"[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation." (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401, 39 P.3d 432], citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1018 [68 Cal.Rptr.2d 648, 945 P.2d 1197] [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

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Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26 and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] ["if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation]."].)

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3427. Involuntary Intoxication

Consider any evidence that the defendant was involuntarily intoxicated in deciding whether the defendant had the required (intent/ [or] mental state) when (he/she) acted.

A person is *involuntarily intoxicated* if he or she unknowingly ingested some intoxicating liquor, drug, or other substance, or if his or her intoxication is caused by the force, duress, fraud, or trickery of someone else, for whatever purpose[, without any fault on the part of the intoxicated person].

BENCH NOTES

Instructional Duty

It appears that the court has no sua sponte duty to instruct on involuntary intoxication, unless the intoxication results in unconsciousness. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [no sua sponte duty when evidence of voluntary intoxication presented to negate element of offense].) If the defendant is relying on the defense of unconsciousness caused by involuntary intoxication, see CALCRIM No. 3425, *Unconsciousness*.

In the definition of "involuntarily intoxicated," the phrase "without any fault on the part of the intoxicated person" is taken from *People v. Velez* (1985) 175 Cal.App.3d 785, 796 [221 Cal.Rptr. 631]. It is unclear when this concept of "fault" would apply if the person has no knowledge of the presence of the intoxicating substance. The committee has included the language in brackets for the court to use at its discretion.

Related Instructions

See CALCRIM No. 3426, *Voluntary Intoxication*.

AUTHORITY

- Instructional Requirements. See Pen. Code, § 26(3).
- Burden of Proof. See *People v. Saille* (1991) 54 Cal.3d 1103, 1106 [2 Cal.Rptr.2d 364, 820 P.2d 588] [in context of voluntary intoxication].

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- Involuntary Intoxication Defined. *People v. Velez* (1985) 175 Cal.App.3d 785, 796 [221 Cal.Rptr. 631].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 34, 15.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).

COMMENTARY

One court has held that a mistake of fact defense (see Pen. Code, § 26(3)) can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–832 [194 Cal.Rptr. 633].) For further discussion, see CALCRIM No. 3406, *Mistake of Fact*.

RELATED ISSUES

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26, and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime].)

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3428. Mental Impairment: Defense to Specific Intent or Mental State

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You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime.

The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: _____ <*insert specific intent or mental state required, e.g., "malice aforethought," "the intent to permanently deprive the owner of his or her property," or "knowledge that . . ."*>**. If the People have not met this burden, you must find the defendant not guilty of** _____ <*insert name of alleged offense*>**.**

<*Repeat this paragraph for each offense requiring specific intent or a specific mental state.*>

[Do not consider evidence of mental (disease[,]/ [or] defect[,]/ [or] disorder) when deciding if _____ <*insert name of nontarget offense*> **was a natural and probable consequence of** _____ <*insert name of target offense*>**.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on mental impairment as a defense to specific intent or mental state; however, the trial court must give this instruction on request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) The jury may consider evidence of mental impairment and its effect on the defendant's ability to form any mental state required for the offense charged. (Pen. Code, § 28; *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [voluntary intoxication relevant to mental state in aiding and abetting].)

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Evidence of mental impairment may not be considered for general-intent crimes, unless there is an element, such as knowledge, that requires a specific mental state. (*People v. Reyes, supra,* 52 Cal.App.4th at pp. 983–985; *People v. Mendoza, supra,* 18 Cal.4th at pp. 1131–1134 [aiding and abetting].)

In all cases, the court must insert the specific intent or mental state required and the offense for which the mental state is an element. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

Give the bracketed paragraph that begins with "You must not consider evidence of mental" when instructing on aiding and abetting liability for a nontarget offense. (*People v. Mendoza, supra,* 18 Cal.4th at p. 1134.)

AUTHORITY

- Statutory Authority. Pen. Code, § 28; see also Pen. Code, §§ 25, 29.
- Instructional Requirements. *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Mental States—Knowledge. *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985 [61 Cal.Rptr.2d 39].
- Mental States—Aiding and Abetting. *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [60 Cal.Rptr. 234, 429 P.2d 586].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) *Defenses*, § 10.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.03 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Scope of Expert Testimony

Penal Code section 29 provides that an expert testifying about a defendant's mental illness "shall not testify as to whether the defendant had or did not have the required mental states." (Pen. Code, § 29.) In *People*

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v. Coddington (2000) 23 Cal.4th 529, 582–583 [97 Cal.Rptr.2d 528, 2 P.3d 1081], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [108 Cal.Rptr.2d 409, 25 P.3d 618], the Supreme Court held that the trial court improperly restricted the scope of the expert testimony when the court refused to permit "hypothetical questions regarding the effect of mental defect or illness on a person's ability to deliberate or premeditate." (*Id.* at p. 582.) "An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (*Id.* at pp. 582–583 [italics original]; see also *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364–1365 [58 Cal.Rptr.2d 294] [discussing appropriate scope of expert testimony].)

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3429. Reasonable Person Standard for Physically Disabled Person

A person with a physical disability is required to (know what/use the amount of care that) a reasonably careful person with the same physical disability would (know/use) in the same situation.

BENCH NOTES

Instructional Duty

The court should give this instruction on request if the defendant has a physical disability and the crimes charged or lesser offenses include a reasonable person standard. (*People v. Mathews* (1994) 25 Cal.App.4th 89, 99–100 [30 Cal.Rptr. 2d 330].) This includes cases where the prosecution must prove that the defendant "reasonably should have known" a fact, and cases involving negligence.

For example, in *People v. Mathews, supra,* 25 Cal.App.4th at pp. 93–94 [30 Cal.Rptr.2d 330], the defendant, who was blind, hearing impaired, and confined to a wheelchair, was charged with brandishing a firearm at police officers when the officers entered the defendant's home. The issue at trial was whether the defendant "reasonably should have known" that these were officers entering his home. (*Id.* at p. 98.) The court held that the trial court erred by failing to give the defense's requested instruction that the defendant must be held to the standard of a reasonable person with the same physical disabilities, not to the standard of a reasonable person without disabilities. (*Id.* at pp. 99–100.)

If the case requires the prosecution to prove that the defendant "reasonably should have known" a fact, then, in the first parenthesis, select the words "know what" and, in the second, select "know."

If the case requires the prosecution to prove negligence by the defendant, then, in the first parenthesis, select the phrase "use the amount of care that" and, in the second, select "use."

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

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AUTHORITY

- Instructional Requirements. *People v. Mathews* (1994) 25 Cal.App.4th 89, 99–100 [30 Cal.Rptr.2d 330].
- Authority. Restatement Second of Torts, § 283C; see also Restatement Second of Torts, § 283B; CACI No. 403.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][b] (Matthew Bender).

RELATED ISSUES

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

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C. INSANITY AND CIVIL COMMITMENTS

3450. Insanity: Determination, Effect of Verdict

You have found the defendant guilty of _____ <*insert crime[s]*>. Now you must decide whether (he/she) was legally insane when (he/she) committed the crime[s].

The defendant must prove that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s].

The defendant was legally insane if:

1. **When (he/she) committed the crime[s], (he/she) had a mental disease or defect;**

AND

2. **Because of that disease or defect, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong.**

None of the following qualify as a mental disease or defect for purposes of an insanity defense: personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.]

[If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. A *settled mental disease or*

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defect **is one that remains after the effect of the drugs or intoxicants has worn off.]**

You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime[s]. If you are satisfied that (he/she) had a mental disease or defect before (he/she) committed the crime[s], you may conclude that (he/she) suffered from that same condition when (he/she) committed the crime[s]. You must still decide whether that mental disease or defect constitutes legal insanity.

[If you find the defendant was legally insane at the time of (his/her) crime[s], (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/She) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.]

[If you conclude that at times the defendant was legally sane and at other times the defendant was legally insane, you must assume that (he/she) was legally sane when (he/she) committed the crime[s].]

[If you conclude that the defendant was legally sane at the time (he/she) committed the crime[s], then it is no defense that (he/she) committed the crime[s] as a result of an uncontrollable or irresistible impulse.]

If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s], you must return a verdict of not guilty by reason of insanity.

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on insanity when the defendant has entered a plea of not guilty by reason of insanity. (Pen. Code, § 25.)

Give the bracketed paragraph that begins with "Special rules apply" when the sole basis of insanity is the defendant's use of intoxicants. (Pen. Code, § 25.5; *People v. Robinson* (1999) 72 Cal.App.4th 421, 427–428 [84 Cal.Rptr.2d 832].) If the defendant's use of intoxicants is not the sole basis or causative factor of insanity, but rather one factor among others, give the bracketed paragraph that begins with "If the defendant suffered from a settled mental." (*Id.* at p. 430, fn. 5.)

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 286].)

There is no sua sponte duty to inform the jury that an insanity verdict would result in the defendant's commitment to a mental hospital. However, this instruction must be given on request. (*People v. Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People v. Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].)

If the court conducts a bifurcated trial on the insanity plea, the court **must** also give the appropriate posttrial instructions such as CALCRIM No. 3550, *Pre-Deliberation Instructions*; CALCRIM No. 222, *Evidence*; and CALCRIM No. 226, *Witnesses*. (See *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].) These instructions may need to be modified.

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 25, 25.5; *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].
- Burden of Proof. Pen. Code, § 25(b).
- Commitment to Hospital. Pen. Code, §§ 1026, 1026.5; *People v. Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People v. Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].
- Excluded Conditions. Pen. Code, § 25.5.

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- Anti-social Acts. *People v. Fields* (1983) 35 Cal.3d 329, 368–372 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271 [252 Cal.Rptr. 913].
- Long-Term Substance Use. *People v. Robinson* (1999) 72 Cal.App.4th 421, 427 [84 Cal.Rptr.2d 832].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 7–16.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.02 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial,* § 86.01A (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Bifurcated Proceedings

The defendant has a right to bifurcated proceedings on the questions of sanity and guilt. (Pen. Code, § 1026.) When the defendant enters *both* a "not guilty" and a "not guilty by reason of insanity" plea, the defendant must be tried first with respect to guilt. If the defendant is found guilty, he or she is then tried with respect to sanity. The defendant may waive bifurcation and have both guilt and sanity tried at the same time. (Pen. Code, § 1026(a).)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765, 768 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5, subdivision (b), is whether a defendant, "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others."

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(*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr.2d 247.)

Legal and Moral Wrong

The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–784 [217 Cal.Rptr. 685]; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274 [252 Cal.Rptr. 913, 704 P.2d 752].)

Temporary Insanity

The defendant's insanity does not need to be permanent in order to establish a defense. The relevant inquiry is the defendant's mental state at the time the offense was committed. (*People v. Kelly* (1973) 10 Cal.3d 565, 577 [111 Cal.Rptr. 171, 516 P.2d 875].)

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3451. Present Mental Competence of Defendant

You must decide whether the defendant is mentally competent to stand trial. That is the only purpose of this proceeding. Do not consider whether the defendant is guilty or not guilty of any crime or whether (he/she) was sane or insane at the time that any alleged crime was committed.

The defendant is mentally competent to stand trial if (he/she) can do all of the following:

1. **Understand the nature and purpose of the criminal proceedings against (him/her);**
2. **Assist, in a rational manner, (his/her) attorney in presenting (his/her) defense;**

AND

3. **Understand (his/her) own status and condition in the criminal proceedings.**

The law presumes that a defendant is mentally competent. In order to overcome this presumption, ((the defendant/the People) must prove/it must be proved) that it is more likely than not that the defendant is now mentally incompetent because of a (mental disorder/developmental disability).

[A *developmental disability* is a disability that begins before a person is 18 years old and continues, or is expected to continue, for an indefinite period of time. It must be a substantial handicap and does not include other handicapping conditions that are solely physical in nature. Examples of developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and conditions closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the standard for competence.

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The party that seeks a finding of incompetence bears the burden of proof. If the court raises the issue, neither party bears that burden. Choose the appropriate language regarding which party bears the burden of proof in the paragraph that begins with "The law presumes that . . . ." (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459–460 [280 Cal.Rptr. 175].)

Give CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant posttrial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 286]).

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 1367–1370.
- Developmental Disability Defined. Pen. Code, § 1370.1(a)(1)(H).
- Presumption of Competence. Pen. Code, § 1369(f).
- Unanimous Verdict. Pen. Code, § 1369(f).

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 698.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 64, *Suspension of Criminal Proceedings,* §§ 64.01, 64.02 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Threshold for Section 1368 Hearing

A trial court must conduct a section 1368 hearing when there is substantial evidence of incompetence. (*People v. Cox* (1978) 82 Cal.App.3d 221, 225–226 [147 Cal.Rptr. 73].) Substantial evidence raises a reasonable doubt about the defendant's competence to stand trial. (*People v. Frye* (1998) 18 Cal.4th 894, 951–952 [77 Cal.Rptr.2d 25, 959 P.2d 183].)

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Defense Counsel May Seek Finding Contrary to Client's Wishes

A section 1368 hearing is civil in nature. Since neither guilt nor innocence is at issue, defense counsel must "advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position [citation]." (*People v. Stanley* (1995) 10 Cal.4th 764, 804 [42 Cal.Rptr.2d 543, 897 P.2d 481].)

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3452. Determining Restoration to Sanity

The defendant was previously found not guilty of a crime and committed to a mental health facility. You must decide whether the defendant currently poses a danger to the health and safety of others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide the defendant's mental condition at any other time or whether (he/she) is guilty of any crime.

<Alternative A—defendant's ability to continue unsupervised self-medication not an issue>

[The law presumes that the defendant currently poses a danger to the health and safety of others as a result of a mental disease, defect, or disorder. In order to overcome this presumption, the defendant has the burden of proving that it is more likely than not that (he/she) no longer poses such a danger.]

<Alternative B—defendant's ability to continue unsupervised self-medication an issue>

[The law presumes that the defendant currently poses a danger to the health and safety of others as a result of a mental disease, defect, or disorder. In order to overcome this presumption, the defendant has the burden of proving that it is more likely than not that:

1. **(He/She) is no longer a danger to the health and safety of others because (he/she) is now taking prescribed medicine that controls (his/her) mental condition;**

AND

2. **(He/She) will continue to take that medicine in an unsupervised environment.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for determining if a defendant has been restored to sanity.

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Revise and give CALCRIM No. 3550, *Pre-Deliberation Instructions*, as follows: replace the paragraph that begins with "Your verdict [on each count and any special finding(s)] must be unanimous" with "Nine or more of you must agree on your verdict." (*In re Franklin* (1972) 7 Cal.3d 126, 149 [101 Cal.Rptr. 553, 496 P.2d 465].) In addition, give any other relevant posttrial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 285].)

Do not give this instruction in conjunction with proceedings under Penal Code sections 2970 and 2972. (*People v. Noble* (2002) 100 Cal.App.4th 184, 190 [121 Cal.Rptr.2d 918].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 1026.2.
- Unsupervised Self-Medication. *People v. Williams* (1988) 198 Cal.App.3d 1476, 1481–1482 [244 Cal.Rptr. 429].
- Presumption of Continuing Insanity. *In re Franklin* (1972) 7 Cal.3d 126, 141 [101 Cal.Rptr. 553, 496 P.2d 465] [interpreting precursor statute].
- Three-Fourths Verdict and Defendant's Burden of Proof. *In re Franklin* (1972) 7 Cal.3d 126, 149 [101 Cal.Rptr. 553, 496 P.2d 465]; *People v. Mapp* (1983) 150 Cal.App.3d 346, 351 [198 Cal.Rptr. 177].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 679–690.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial,* § 86.10[4], [7] (Matthew Bender).

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RELATED ISSUES

Court May Order a Directed Verdict

The court may order a directed verdict when insufficiency of the evidence warrants it. (*People v. Mapp* (1983) 150 Cal.App.3d 346, 351 [198 Cal.Rptr. 177].)

Both Parties Have Right to Jury Trial on Issue of Restoration of Sanity

Even if the defendant waives the right to a jury on the issue of restoration of sanity, the prosecution may still assert their right to a jury. (*People v. Superior Court (Almond)* (1990) 219 Cal.App.3d 607, 612 [268 Cal.Rptr. 375].)

No Right to Jury Trial on First-Stage Hearing on Outpatient Treatment

Even though success at the first-stage hearing is a necessary step on the way to eventual release, equal protection does not require that a criminal defendant who has been committed have a right to a jury at such a hearing. (*People v. Tilbury* (1991) 54 Cal.3d 56, 67 [284 Cal.Rptr. 288, 813 P.2d 1318].)

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3453. Extension of Commitment

_____ <*insert name of respondent*> has been committed to a mental health facility. You must decide whether (he/she) currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide _____ <*insert name of respondent*>'s mental condition at any other time or whether (he/she) is guilty of any crime.

To prove that _____ <*insert name of respondent*> currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder, the People must prove beyond a reasonable doubt that:

1. **(He/She) suffers from a mental disease, defect, or disorder;**

   AND

2. **As a result of (his/her) mental disease, defect, or disorder, (he/she) now poses a substantial danger of physical harm to others.**

[Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense, _____ <*insert name of respondent*> must prove by a preponderance of the evidence that:

1. **(He/She) no longer poses a substantial danger of physical harm to others because (he/she) is now taking medicine that controls (his/her) mental condition;**

   AND

2. **(He/She) will continue to take that medicine in an unsupervised environment.**

Proof by *a preponderance of the evidence* is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.]

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for extending commitment.

Give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, and CALCRIM No. 3550, *Pre-Deliberation Instructions*, as well as any other relevant posttrial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

AUTHORITY

- Instructional Requirements. Pen. Code, § 1026.5(b)(1).
- Unanimous Verdict, Burden of Proof. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Affirmative Defense of Medication. *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600–1602 [266 Cal.Rptr. 724].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 693.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial,* § 86.10[7] (Matthew Bender).

RELATED ISSUES

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752.) In contrast, the standard for recommitment under Penal Code section 1026.5(b) is whether a defendant, "by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others." (*People v. Superior Court,*

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supra, 233 Cal.App.3d at pp. 489–490; see *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr. 2d 247].)

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3454. Commitment as Sexually Violent Predator

The petition alleges that _____ <*insert name of respondent*> is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **(He/She) has been convicted of committing sexually violent offenses against two or more victims;**
2. **(He/She) has a diagnosed mental disorder;**

[AND]

3. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 4 when instructing on confinement in a secure facility.>

[AND

4. **It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community.

The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a

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relationship has been established or promoted for the primary purpose of victimization.

_____ <*insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)*> **(is/are) [a]** ***sexually violent offense[s]*** **when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person.**

[_____ <*insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)*> **(is/are) also [a]** ***sexually violent offense[s]*** **when the offense[s] (is/are) committed on a child under 14 years old and the offense[s] involve[s] substantial sexual conduct.** ***Substantial sexual conduct*** **means oral copulation, or masturbation of either the victim or the offender, or penetration of the vagina or rectum of either the victim or the offender with the penis of the other or with any foreign object.]**

As used here, a ***conviction*** **for committing a sexually violent offense is one of the following:**

<*Give the appropriate bracketed description[s] below.*>

<*A. Conviction With Fixed Sentence*>

[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<*B. Conviction With Indeterminate Sentence*>

[A conviction for an offense that I have just described to you that was committed before July 1, 1977, and resulted in an indeterminate sentence.]

<*C. Conviction in Another Jurisdiction*>

[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<*D. Conviction Under Previous Statute*>

[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

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<E. Conviction With Probation>

[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>

[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>

[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

You may not conclude that _____ <*insert name of respondent*> is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.

In order to prove that _____ <*insert name of respondent*> is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

If sufficient evidence is presented to raise a reasonable doubt as to amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (People v. Grassini (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [4 Cal.Rptr.3d 92].)

The court also **must give** CALCRIM No. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any

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other relevant posttrial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr 684, 74 P.3d 779].

AUTHORITY

- Elements and Definitions. Welf. & Inst. Code, §§ 6600, 6600.1.
- Unanimous Verdict, Burden of Proof. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined. *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined. *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility. *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined. Pen. Code, § 1170.
- Impairment of Control. *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment. *People v. Cooley* (2002) 29 Cal.4th 228, 256.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 193.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole,* § 104.06 (Matthew Bender).

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RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings

Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact

Substantial sexual conduct with a child under 14 years old includes masturbation where the touching of the minor's genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) "[T]he trial court properly instructed the jury when it told the jury that '[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.' " (*People v. Lopez, supra,* 123 Cal.App.4th at p. 1312.)

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3455. Idiocy as a Defense

You may not find the defendant guilty of _____ <*insert description of crime*> if (he/she) was legally incapable of committing a crime because of idiocy.

The defendant was legally incapable of committing a crime because of idiocy if at the time the crime was committed:

1. **(He/She) had a mental disease or defect;**

AND

2. **Because of that disease or defect, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong.**

The defendant has the burden of proving this defense by a preponderance of the evidence. [This is a different burden of proof from proof beyond a reasonable doubt.] To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that (he/she) was legally incapable of committing a crime because of idiocy.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on idiocy when the defendant has raised this defense. (Pen. Code, § 25.)

If the court grants a bifurcated trial on the defense of idiocy, the court must also give the appropriate posttrial instructions such as CALCRIM No. 3550, *Pre-Deliberation Instructions*; CALCRIM No. 222, *Evidence*; and CALCRIM No. 226, *Witnesses*. (See *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].)

If the court does not grant a bifurcated trial, give the bracketed sentence "This is a different burden of proof from proof beyond a reasonable doubt."

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AUTHORITY

- Instructional Requirements. Pen. Code, §§ 25, 25.5, 26.
- Burden of Proof. *In re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].).
- Same Test for Both Idiocy and Insanity. *In re Ramon M.* (1978) 22 Cal.3d 419, 427 [149 Cal.Rptr. 387, 584 P.2d 524].).
- Requirement of Mental Disease or Defect. *People v. McCaslin* (1986) 178 Cal.App.3d 1, 8 [223 Cal.Rptr. 587].
- Incapacity Based on Mental Disease or Defect. *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271 [252 Cal.Rptr. 913].
- Penal Code Section 25(b) Supersedes Model Penal Code Test. *People v. Phillips* (2000) 83 Cal.App.4th 170, 173 [83 Cal.Rptr.2d 448].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 2.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[3], 73.18 (Matthew Bender).

COMMENTARY

In *In re Ramon M.* (1978) 22 Cal.3d 419, 427 [149 Cal.Rptr. 387, 584 P.2d 524], the Supreme Court held that the same test should apply for determining both idiocy and insanity. However, the court was applying the Model Penal Code test, which was subsequently superseded by Proposition 8 as codified in Penal Code section 25(b). The Court of Appeal in *People v. Phillips* (2000) 83 Cal.App.4th 170, 173 [83 Cal.Rptr.2d 448], expressly found that "the test for insanity as stated in section 25, subdivision (b) applies also to determine whether a person is an idiot pursuant to section 26." Accordingly, the committee followed *Phillips* in drafting this instruction.

RELATED ISSUES

Legal and Moral Wrong

The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765,

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777–784 [217 Cal.Rptr. 685, 704 P.2d 752]; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274 [252 Cal.Rptr. 913].)

Penal Code Sections 1016, 1017, 1026, 1027

The Supreme Court found in *In re Ramon M.* (1978) 22 Cal.3d 419, 427 [149 Cal.Rptr. 387, 584 P.2d 524] that the same test for legal incapacity should apply to both insanity and mental retardation. Moreover, the court concluded that the Legislature "probably intended [Pen. Code, §§ 1016, 1017, 1026, 1027] to apply to all persons who assertedly lack mental capacity to commit crime [citation]. In light of this legislative intent, and of the identity of the legal test for idiocy and insanity . . . we conclude that the term 'insanity' in Penal Code sections 1016 through 1027 refers to mental incapacity, whether arising from mental illness or mental retardation. Accordingly a defendant asserting a defense of idiocy should raise that defense by separate plea (see Pen. Code, §§ 1016, 1017), may obtain a bifurcated trial (see Pen. Code, § 1026), [and] must prove his incapacity by a preponderance of the evidence [citation] . . . ." (*Id.* at p. 427, fn. 10.)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity and idiocy is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5(b) is whether a defendant, "by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr.2d 247].)

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D. SELF-DEFENSE AND DEFENSE OF ANOTHER

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

The defendant is not guilty of _____ <*insert crime(s) charged*> if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name of third party*>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];**
2. **The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;**

AND

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/ herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on

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information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <*insert name of victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <*insert name of victim*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of victim*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/_____ <*insert crime*>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime(s) charged*>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is

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substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case [citation]." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra,* 19 Cal.4th at p. 156 [77 Cal.Rptr.2d 870].) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

AUTHORITY

- Instructional Requirements. *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].

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- Lawful Resistance. Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

Ex-Felon in Possession of Weapon

"[W]hen [an ex-felon] is in imminent peril of great bodily harm or . . . reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in

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which the necessity or apparent necessity to use it in self-defense continues, does not violate [Penal Code] section 12021. . . . [T]he use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available." (*People v. King* (1978) 22 Cal.3d 12, 24, 26 [148 Cal.Rptr. 409, 582 P.2d 1000] [error to refuse instructions on self-defense and defense of others]; see also CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self-Defense*.)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

See also the Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

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3471. Right to Self-Defense: Mutual Combat or Initial Aggressor

A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if:

1. (He/She) actually and in good faith tries to stop fighting;

[AND]

2. (He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.)

<Give element 3 in cases of mutual combat>

[AND

3. (He/She) gives (his/her) opponent a chance to stop fighting.]

If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight.

[If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give defense instructions supported by the evidence and not inconsistent with the defendant's theory of the case. (*People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

Give bracketed element 3 if the person claiming self-defense was engaged in mutual combat.

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If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may defend himself or herself using deadly force. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307].) In such cases, give the bracketed sentence that begins with "If you decide that."

If the defendant was the initial aggressor and is charged with homicide, always give CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*, in conjunction with this instruction.

AUTHORITY

- Instructional Requirements. See Pen. Code, § 197, subd. 3; *People v. Button* (1895) 106 Cal. 628, 633 [39 P. 1073]; *People v. Crandell* (1988) 46 Cal.3d 833, 871–872 [251 Cal.Rptr. 227, 760 P.2d 423]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749].
- Escalation to Deadly Force. *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307]; *People v. Anderson* (1922) 57 Cal.App. 721, 727 [208 P. 204].

Secondary Sources

1 Witkin & Epstein, Caifornia. Criminal Law (3d ed. 2000) Defenses, § 75.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[2][a] (Matthew Bender).

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3472. Right to Self-Defense: May Not Be Contrived

A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

BENCH NOTES

Instructional Duty

The court may give this instruction on request when supported by the evidence. *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596].)

AUTHORITY

- Instructional Requirements. *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596]; *Fragulia v. Sala* (1936) 17 Cal.App.2d 738, 743–744 [62 P.2d 783]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 75.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[2][a] (Matthew Bender).

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3474. Danger No Longer Exists or Attacker Disabled

The right to use force in (self-defense/ [or] defense of another) continues only as long as the danger exists or reasonably appears to exist. [When the attacker (withdraws/ [or] no longer appears capable of inflicting any injury), then the right to use force ends.]

BENCH NOTES

Instructional Duty

The court may give this instruction on request when supported by the evidence. (See *People v. Martin* (1980) 101 Cal.App.3d 1000, 1010 [162 Cal.Rptr. 133].)

AUTHORITY

- Instructional Requirements. See *People v. Keys* (1944) 62 Cal.App.2d 903, 916 [145 P.2d 589]; *People v. Perez* (1970) 12 Cal.App.3d 232, 236 [90 Cal.Rptr. 521].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 76.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[1][b] (Matthew Bender).

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3475. Right to Eject Trespasser From Real Property

The (owner/lawful occupant) of a (home/property) may request that a trespasser leave the (home/property). If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to (the (home/property)/ [or] the (owner/ [or] occupants), the (owner/ lawful occupant) may use reasonable force to make the trespasser leave.

Reasonable force **means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave.**

[If the trespasser resists, the (owner/lawful occupant) may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property.]

When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime*>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on the defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr. 2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally].)

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Related Instructions

CALCRIM No. 3476, *Right to Defend Real or Personal Property*.

CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury*.

CALCRIM No. 506, *Justifiable Homicide: Defending Against Harm to Person Within Home or on Property*.

AUTHORITY

- Instructional Requirements. See *People v. Corlett* (1944) 67 Cal.App.2d 33, 51–52 [153 P.2d 595]; *People v. Teixeira* (1899) 123 Cal. 297, 298–299 [55 P. 988]; Civ. Code, § 50.
- Burden of Proof. See *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [24 Cal.Rptr. 192] [civil action].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 78.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11[1], 73.13[2] (Matthew Bender).

RELATED ISSUES

Negating Self-Defense Claim

The right to defend one's home may negate a defendant's claim of imperfect self-defense, as held in *People v. Watie* (2002) 100 Cal.App.4th 866, 878 [124 Cal.Rptr.2d 258]:

> [T]he right of a victim to defend himself and his property is a relevant consideration in determining whether a defendant may prevail when he seeks to negate malice aforethought by asserting the affirmative defense of imperfect self-defense. . . [¶] . . .If [the victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect, or otherwise.

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3476. Right to Defend Real or Personal Property

The owner [or possessor] of (real/ [or] personal) property may use reasonable force to protect that property from imminent harm. [A person may also use reasonable force to protect the property of a (family member/guest/master/servant/ward) from immediate harm.]

Reasonable force **means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm.**

When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable to protect property from imminent harm. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime*>**.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on the defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally].)

Related Instructions

CALCRIM No. 3475, *Right to Eject Trespasser From Real Property.*

CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury.*

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CALCRIM No. 506, *Justifiable Homicide: Defending Against Harm to Person Within Home or on Property*.

AUTHORITY

- Instructional Requirements. See Civ. Code, § 50; *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [24 Cal.Rptr. 192].
- Burden of Proof. See *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [24 Cal.Rptr. 192] [civil action].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 78.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.13 (Matthew Bender).

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3477. Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury

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The law presumes that the defendant reasonably feared imminent death or great bodily injury to (himself/herself)[, or to a member of (his/her) family or household,] if:

1. **An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;**
2. **The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;**
3. **The intruder was not a member of the defendant's household or family;**

AND

4. **The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home.**

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of overcoming this presumption. This means that the People must prove that the defendant did not have a reasonable fear of imminent death or injury to (himself/herself)[, or to a member of his or her family or household,] when (he/she) used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury to (himself/herself)[, or to a member of his or her family or household].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on presumptions relevant to the issues of the case. (See *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370]; but see *People v. Silvey* (1997) 58

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Cal.App.4th 1320, 1327 [68 Cal.Rptr.2d 681] [presumption not relevant because defendant was not a resident]; *People v. Owen* (1991) 226 Cal.App.3d 996, 1005 [277 Cal.Rptr. 341] [jury was otherwise adequately instructed on pertinent law].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 198.5; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495 [8 Cal.Rptr.2d 513].
- Rebuttable Presumptions Affecting Burden of Proof. Evid. Code, §§ 601, 604, 606.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 73.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11[1], 73.13 (Matthew Bender).

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POST-TRIAL: CONCLUDING

A. UNANIMITY

3500. Unanimity

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A. UNANIMITY

3500. Unanimity

The defendant is charged with _____ <*insert description of alleged offense*> [in Count ____] [sometime during the period of _____ to _____].

The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give a unanimity instruction if the prosecution presents evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Diedrich* (1982) 31 Cal.3d 263, 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Alva* (1979) 90 Cal.App.3d 418, 426 [153 Cal.Rptr. 644].) The committee has addressed unanimity in those instructions where the issue is most likely to arise. If a case raises a unanimity issue and other instructions do not adequately cover the point, give this instruction.

The Supreme Court has stated the rule as follows: "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo, supra,* 25 Cal.4th at p. 1132; see also *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619 [21 Cal.Rptr.2d 751] [unanimity required in forgery case

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where prosecution alleges forgery of multiple documents under single count, but not where defendant charged with forging and uttering single document].)

The court has no sua sponte duty to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Maury* (2003) 30 Cal.4th 342, 423 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Madden, supra,* 116 Cal.App.3d at p. 218.) "This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777], quoting *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309 [18 Cal.Rptr.2d 511]; internal quotation marks and citations omitted].) The court should carefully examine the statute under which the defendant is charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*Ibid.*) [noting that child abuse may be a continuous course of conduct or a single, isolated incident]; see also *People v. Madden, supra,* 116 Cal.App.3d at p. 218 [distinguishing "continuous crime spree" and finding repeated sexual offenses did not constitute continuous course of conduct]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185 [7 Cal.Rptr.3d 483] [unanimity instruction required where acts fragmented in time or space]; *People v. Rae* (2002) 102 Cal.App.4th 116, 123 [125 Cal.Rptr.2d 312] [elder abuse offense did constitute continuous course of conduct]; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1209 [8 Cal.Rptr.2d 580] [kidnapping is a continuous course of conduct].)

In addition, "where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the [unanimity] instruction is not necessary to the jury's understanding of the case." (*People v. Beardslee* (1991) 53 Cal.3d 68, 93 [279 Cal.Rptr. 276, 806 P.2d 1311]; see also *People v. Champion* (1995) 9 Cal.4th 879, 932 [39 Cal.Rptr.2d 547, 891 P.2d 93], questioned on unrelated issue in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 [52 Cal.Rptr.2d 296, 914 P.2d 846].) However, the court should use caution in applying this exception. (See *People v. Brown* (1996) 42 Cal.App.4th 1493, 1500–1501 [50 Cal.Rptr.2d 407]; *People v. Wolfe, supra,* 114 Cal.App.4th at p. 185.) The better practice is to provide a unanimity instruction to the jury when evidence has been admitted of separate acts that could form the basis for one charge.

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The jury need not unanimously agree on whether the defendant was an aider and abettor or a direct perpetrator of the offense. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; *People v. Beardslee, supra,* 53 Cal.3d at p. 93.)

The jury need not unanimously agree on which provocative act the defendant committed when prosecution is pursing a provocative-act theory of murder. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

In a conspiracy case, the jury need not unanimously agree on what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra,* 25 Cal.4th at pp. 1135–1136.) However, if a conspiracy case involves an issue about the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*Id.* at p. 1136, fn. 2.)

In a child molestation case, if the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the court should determine whether it is more appropriate to give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) See discussion below in Related Issues section.

If the prosecution elects one act among many as the basis for the offense, do not give this instruction. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].) Give CALCRIM No. 3502, *Unanimity: When Prosecution Elects One Act Among Many*.

Give the bracketed "sometime during the period" if the information alleges that the charged event happened during a period of time rather than on a single date.

AUTHORITY

- Unanimity Required. Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Instruction Required If Multiple Acts Could Support Single Charge. *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Diedrich* (1982) 31 Cal.3d 263, 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Alva* (1979) 90 Cal.App.3d 418, 426 [153 Cal.Rptr. 644].

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- Continuous Course of Conduct. *People v. Maury* (2003) 30 Cal.4th 342, 423 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185 [7 Cal.Rptr.3d 483].
- Acts Substantially Identical in Nature. *People v. Beardslee* (1991) 53 Cal.3d 68, 93 [279 Cal.Rptr. 276, 806 P.2d 1311]; see also *People v. Champion* (1995) 9 Cal.4th 879, 932 [39 Cal.Rptr.2d 547, 81 P.2d 93], questioned on unrelated issue in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 [52 Cal.Rptr.2d 296, 914 P.2d 846].
- Aider and Abettor v. Direct Perpetrator. *People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026 [95 Cal.Rptr. 2d 377, 997 P.2d 1044]; *People v. Beardslee* (1991) 53 Cal.3d 68, 93 [279 Cal.Rptr. 276, 806 P.2d 1311].
- Provocative-Act Murder. *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].
- Conspiracy. *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Generic Testimony. *People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].
- Must Instruct on Election by Prosecutor. *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 644–648.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[9] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 84, *Motions at Trial*, § 84.03[2][b], Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][c][iii] (Matthew Bender).

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RELATED ISSUES

Cases Based on Generic Testimony

In *People v. Jones* (1990) 51 Cal.3d 294 [270 Cal.Rptr. 611, 792 P.2d 643], the Court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The Court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The Court then addressed what type of unanimity instruction is required in such cases:

> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448 [127 Cal.Rptr.2d 472].) If the court concludes that the modified jury instruction is appropriate, do not give this instruction. Give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented.*

Instruction That Unanimity Not Required

In *People v. Culuko* (2000) 78 Cal.App.4th 307, 321–323 [92 Cal.Rptr.2d 789], the court held that an instruction stating that the jurors need not agree on whether the defendant was an aider and abettor or a principal was a correct statement of the law and not error to give. However, in *People v. Napoles* (2002) 104 Cal.App.4th 108, 119 [127 Cal.Rptr.2d 777], the court found that the nonunanimity instruction given in that case was erroneous. The court cautioned against giving any nonunanimity instruction in a case involving a continuous course of conduct offense. (*Id.* at p. 119, fn. 6.) The court stated that if a nonunanimity instruction must be given, the following language would be appropriate:

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> The defendant is accused of having [], [in count] by having engaged in a course of conduct between [date] and [date]. The People must prove beyond a reasonable doubt that the defendant engaged in this course of conduct. Each juror must agree that defendant engaged in acts or omissions that prove the required course of conduct. As long as each of you is convinced beyond a reasonable doubt that the defendant committed some acts or omissions that prove the course of conduct, you need not all rely on the same acts or omissions to reach that conclusion.

(Ibid.)

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3501. Unanimity: When Generic Testimony of Offense Presented

The defendant is charged with _____ <*insert description[s] of alleged offense[s]*> [in Count[s] ____] sometime during the period of _____ to _____.

The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless:

1. **You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense];**

OR

2. **You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].**

BENCH NOTES

Instructional Duty

In *People v. Jones* (1990) 51 Cal.3d 294 [270 Cal.Rptr. 611, 792 P.2d 643], the Court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The Court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The Court then addressed what type of unanimity instruction is required in such cases:

> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is

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whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448 [127 Cal.Rptr.2d 472].) If the court concludes that the modified jury instruction is appropriate, give this instruction. If the court determines that the standard unanimity instruction is appropriate, give CALCRIM No. 3500, *Unanimity*.

Give the bracketed portions when the defendant is charged with numerous charges for the same offense alleged to have occurred during the specified time period. (See *People v. Matute, supra,* 103 Cal.App.4th at p. 1448 [15 rapes charged during 15 months].)

AUTHORITY

- Unanimity Required. Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Instruction Required If Multiple Acts Could Support Single Charge. *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Diedrich* (1982) 31 Cal.3d 263, 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Alva* (1979) 90 Cal.App.3d 418, 426 [153 Cal.Rptr. 644].
- Generic Testimony. *People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 648.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][c][iii] (Matthew Bender).

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3502. Unanimity: When Prosecution Elects One Act Among Many

You must not find the defendant guilty of _____ <*insert name of alleged offense*> [in Count ____] unless you all agree that the People have proved specifically that the defendant committed that offense [on] _____ <*insert date or other description of event relied on*>. [Evidence that the defendant may have committed the alleged offense (on another day/ [or] in another manner) is not sufficient for you to find (him/her) guilty of the offense charged.]

BENCH NOTES

Instructional Duty

If the prosecutor has elected a specific factual basis for the offense alleged but evidence of multiple acts has been admitted, the court has a **sua sponte** duty to instruct on the election unless the prosecutor informs the jury of the election. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534–1536 [70 Cal.Rptr.2d 878].)

AUTHORITY

- Election Required on Demand. *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Salvato* (1991) 234 Cal.App.3d 872, 882 [285 Cal.Rptr. 837]].
- Instructional Requirements. *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534–1536 [70 Cal.Rptr.2d 878].

Secondary Sources

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[9] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

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B. MULTIPLE COUNTS AND COMPLETION OF VERDICT FORMS

3515. Multiple Counts: Separate Offenses

Each of the counts charged in this case is a separate crime [except for Counts ____, which are charged as alternative offenses]. You must consider each count separately and return a separate verdict for each one [except for Counts ____, which are for lesser included offenses and will be addressed in other instructions].

BENCH NOTES

Instructional Duty

The court should give this instruction on request if the defendant is charged with multiple counts for separate offenses. (*People v. Beagle* (1972) 6 Cal.3d 441, 456 [99 Cal.Rptr. 313, 492 P.2d 1].) The court has no sua sponte duty to give this instruction. *(Ibid.)*

If the prosecution has charged, in the alternative, more than one offense for the same event, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event*. Do not give this instruction unless the case involves both charges for separate events and charges in the alternative for a single event. In such cases, the court should give both instructions, inserting where indicated in this instruction the counts that are addressed in CALCRIM No. 3516.

Likewise, if the case involves lesser included offenses, the court should give either CALCRIM No. 3517, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without* Stone *Instruction (Non-Homicide)*, or CALCRIM No. 3518, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With* Stone *Instruction (Non-Homicide)*. (*See People v. Fields* (1996) 13 Cal.4th 289, 308–311 [52 Cal.Rptr.2d 282, 914 P.2d 832].) Do not give this instruction unless the case involves both charges for separate events and one or more charges with a lesser included offense. In such cases, the court should give both

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instructions, inserting where indicated in this instruction the counts that are addressed in CALCRIM No. 3517 or 3518.

AUTHORITY

- Statutory Authority for Multiple Charges. Pen. Code, § 954.
- Instructional Requirements. *People v. Beagle* (1972) 6 Cal.3d 441, 456 [99 Cal.Rptr. 313, 492 P.2d 1].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.20 (Matthew Bender).

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3516. Multiple Counts: Alternative Charges for One Event

<Alternative A—no lesser included offense>

[The defendant is charged in Count ____ with _____ <*insert name of alleged offense, e.g., theft*> and in Count ____ with _____ <*insert name of alleged offense, e.g., receiving stolen property*>. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]

<Alternative B—lesser included offense[s] to one count>

[Alternative charges are alleged in this case. The defendant is charged in Count ____ with _____ <*insert name of most serious charged offense, e.g., robbery*>. _____ <*insert name[s] of lesser included offense[s], e.g., grand theft*> (is/are) [a] lesser included offense[s] to that charge. The defendant is also charged in Count ____ with _____ <*insert name of other charged offense, e.g., receiving stolen property*>. If you find the defendant guilty of _____ <*insert name of most serious charged offense*> or of the lesser offense[s] of _____ <*insert name[s] of lesser included offense[s]*>, you must find (him/her) not guilty of _____ <*insert name of other charged offense*>. Similarly, if you find the defendant guilty of _____ <*insert name of other charged offense*>, you must find (him/her) not guilty of _____ <*insert name of most serious charged offense*> and not guilty of the lesser offense[s] of _____ <*insert name[s] of lesser included offense[s]*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event. (See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].) When one offense is necessarily included in

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another, the defendant cannot be convicted of both. (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48].) This is to be distinguished from the question of whether the defendant may be punished for two separate charges arising out of a single event. *(Ibid.)* This instruction applies only to those cases in which the defendant may be legally convicted of only one of the alternative charges.

If the defendant is charged with multiple counts for separate offenses, give CALCRIM No. 3515, *Multiple Counts: Separate Offenses*.

If the case involves a lesser included offense, the court should give either CALCRIM No. 3517, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without* Stone *Instruction (Non-Homicide)*, or CALCRIM No. 3518, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With* Stone *Instruction (Non-Homicide)*. (See *People v. Fields* (1996) 13 Cal.4th 289, 308–311 [52 Cal.Rptr.2d 282, 914 P.2d 832].) Do not give this instruction unless the case also involves alternative charges. In such cases, the court should give alternative B.

Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss.

AUTHORITY

- Prohibition Against Dual Conviction. *People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48]; *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Instructional Requirements. See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses

"[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48] [emphasis in original, citations and internal quotation marks omitted]; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [16 Cal.Rptr.3d 902, 94 P.3d 1098].) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether all the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense." (*People v. Montoya, supra,* 33 Cal.4th at p. 1034 [internal quotation marks and citation omitted].)

Some courts have also applied the "accusatory pleading" test to determine whether one offense is necessarily included in another. (See *People v. Malfavon* (2002) 102 Cal.App.4th 727, 742 [125 Cal.Rptr.2d 618] [court must compare "the facts actually alleged in the accusatory pleading" to determine if one offense is necessarily included in the other].) In *People v. Montoya, supra,* 33 Cal.4th at p. 1034, however, the Supreme Court observed that the "accusatory pleading" test is generally used "to determine whether to instruct a jury on an uncharged lesser offense." The Court further noted that "[s]ome Court of Appeal decisions have concluded that the accusatory pleading test . . . does not apply to considerations of whether multiple convictions are proper." (*Id.* at p. 1036 [internal quotation marks and citation omitted].) The Court declined to decide this issue. *(Ibid.)* Justice Chin, in a concurring opinion, expressed the opinion that the "accusatory pleading" test should not be used to determine whether one offense is necessarily included in another. (*Id.* at p. 1039.)

Dual Conviction—Examples of Offense Where Prohibited or Permitted

The courts have held that dual conviction is *prohibited* for the following offenses:

- Robbery and theft. *People v. Ortega* (1998) 19 Cal.4th 686, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48].

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- Robbery and receiving stolen property. *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587 [267 Cal.Rptr. 66].
- Theft and receiving stolen property. *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Battery and assault. See *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Forgery and check fraud. *People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66].
- Forgery and credit card fraud. *People v. Cobb* (1971) 15 Cal.App.3d 1, 4 [93 Cal.Rptr. 152].

The courts have held that dual conviction is *permitted* for the following offenses (although dual punishment is not):

- Burglary and theft. *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [27 Cal.Rptr.2d 839].
- Burglary and receiving stolen property. *People v. Allen* (1999) 21 Cal.4th 846, 866 [89 Cal.Rptr.2d 279, 984 P.2d 486].
- Carjacking and grand theft. *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and robbery. *People v. Ortega* (1998) 19 Cal.4th 686, 700 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and unlawful taking of a vehicle. *People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].
- Murder and gross vehicular manslaughter while intoxicated. *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118].
- Murder and child abuse resulting in death. *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743 [125 Cal.Rptr.2d 618].

Joy Riding and Receiving Stolen Property

A defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that the joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758–759 [129 Cal.Rptr. 306,

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548 P.2d 706]; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252 [273 Cal.Rptr. 212].)

Accessory and Principal

In *People v. Prado* (1977) 67 Cal.App.3d 267, 273 [136 Cal.Rptr. 521], and *People v. Francis* (1982) 129 Cal.App.3d 241, 248 [180 Cal.Rptr. 873], the courts held that the defendant could not be convicted as both a principal and as an accessory after the fact for the same offense. However, later opinions have criticized these cases, concluding, "there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime." (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324 [19 Cal.Rptr.2d 423]; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [25 Cal.Rptr.2d 676]; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536, fn. 6 [26 Cal.Rptr.2d 323].)

(New January 2006)

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3517. Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without *Stone* Instruction (Non-Homicide)

If all of you find that the defendant is not guilty of a charged crime, you may convict (him/her) of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime.

Now I will explain to you which crimes are affected by this instruction:

[_____ <*insert crime*> **is a lesser crime of** _____ <*insert crime*> **[charged in Count** _____**.]]**

[_____ <*insert crime*> **is a lesser crime of** _____ <*insert crime*> **[charged in Count** _____**.]]**

[_____ <*insert crime*> **is a lesser crime of** _____ <*insert crime*> **[charged in Count** _____**.]]**

You must consider each of these (charged/greater) crimes and decide whether the defendant is guilty or not guilty of each one.

It is up to you to decide the order in which you consider each crime and the relevant evidence.

I can only accept a guilty verdict on a lesser crime if you all agree that the defendant is not guilty of the (charged/greater) crime and give me a signed verdict form of not guilty for the (charged/greater) crime.

You will receive verdict forms for (all of these charged crimes and lesser crimes/the charged crime and lesser crime[s]). If all of you are convinced beyond a reasonable doubt that the defendant is guilty of a greater crime, do not fill out or sign a verdict form for the crimes that are lesser than that crime. Give the unused forms back to me unsigned.

If all of you find the defendant not guilty of a greater crime, but conclude that (he/she) is guilty of a lesser crime, indicate your verdict for that lesser crime on the appropriate verdict form and

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give the form for that lesser crime to me after the foreperson has signed it.

If all of you cannot agree about whether the defendant is guilty or not guilty of a greater crime, inform me about your disagreement and do not fill out any verdict form.

If all of you agree that the People have not proved that the defendant committed a greater or lesser crime, then complete the verdict form stating that (he/she) is not guilty of that crime.

BENCH NOTES

Instructional Duty

In all non-homicide cases where one or more lesser included offenses is submitted to the jury, whether charged or not, the court has a **sua sponte** duty to give either this instruction or CALCRIM No. 3518, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With Stone Instruction (Non-Homicide).* (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The Court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give this instruction. If the jury later declares that it is unable to reach a verdict on a lesser included offense, then the court must provide the jury with an

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opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With Stone Instruction*, or CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*.

The court should not accept a guilty verdict on a lesser included offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser included offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, retrial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court's instructions, the jury has returned a guilty verdict on the lesser included offense without explicitly acquitting on the greater offense, the court must again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 310.) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser included offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser included offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at p. 330.)

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].

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- Lesser Included Offenses—Standard. *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense. Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Retrial on Greater. Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal

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when that evidence is sufficient to establish a lesser included offense. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Standard for Determining Lesser Offense

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].)

Acquittal of Greater Does Not Bar Retrial of Lesser

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Lesser Included Offenses Barred by Statute of Limitations

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. *(Ibid.)*

(Revised August 2006)

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3518. Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With *Stone* Instruction (Non-Homicide)

<The court may give the bracketed paragraph below if the jury has failed to reach a verdict and the court wishes to instruct pursuant to Stone>

[Because of your disagreement on Count[s] _____, it is necessary to follow a different procedure for using verdict forms for (that/those) count[s]. Now you must disregard the instructions that I gave you earlier about using verdict forms [for Count[s] _____.]

If all of you find that the defendant is not guilty of a charged crime, you may convict (him/her) of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime.

Now you (will receive/have received) guilty and not guilty verdict forms for Count[s] _____ and the lesser crime[s] to (that/those) crime[s] [charged in Count[s] _____].

[_____ *<insert crime>* ***is a lesser crime of*** _____ *<insert crime>* **[charged in Count _____.]]**

[_____ *<insert crime>* ***is a lesser crime of*** _____ *<insert crime>* **[charged in Count _____.]]**

[_____ *<insert crime>* ***is a lesser crime of*** _____ *<insert crime>* **[charged in Count _____.]]**

It is up to you to decide the order in which you consider each crime and the relevant evidence.

Follow these directions before you give me any signed, final verdict form:

1. **If all of you agree that the defendant is guilty of the crime[s] charged [in Count[s] _____***<insert counts in which greater crimes are charged>***], have the foreperson sign and date the verdict form for (that/those) crime[s].**

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Do not sign any other verdict forms [for Counts[s] _____].

2. **If all of you cannot agree on a verdict for the crime charged [in Count[s] _____<*insert counts in which greater crimes are charged*>], do not sign any verdict forms for (that/those) crime[s] and let me know that you cannot agree.**
3. **I can only accept a verdict of guilty on a lesser crime if all of you have agreed on and given me a signed verdict form of not guilty for the (charged/greater) crime.**
4. **[Apply these directions when you decide whether a defendant is guilty or not guilty of _____ <*insert crime*>, which is a lesser crime than _____ <*insert crime*>.]**

If all of you agree that the People have not proved that the defendant committed a greater or lesser crime, then complete the verdict form stating that (he/she) is not guilty of that crime.

BENCH NOTES

Instructional Duty

In all non-homicide cases in which one or more lesser included offenses is submitted to the jury, whether charged or not, the court has a **sua sponte** duty to give either this instruction or CALCRIM No. 3517, *Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees (Non-Homicide)*. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)

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In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give CALCRIM No. 3519 in place of this instruction.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With Stone Instruction, or CALCRIM No. 641, Procedure for Completion of Verdict Forms: Without Stone Instruction.*

The court should not accept a guilty verdict on a lesser included offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser included offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, retrial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court's instructions, the jury has returned a guilty verdict on the lesser included offense without explicitly acquitting on the greater offense, the court must again instruct the jury that in may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 310.) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*); Pen. Code, § 1161.)

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser included offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser included offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at p. 330.)

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AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; People v. Breverman (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard. *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense. Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d].
- Conviction of Lesser Precludes Retrial on Greater. Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater. Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3517, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees (Non-Homicide).

(Revised August 2006)

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C. ADMONITIONS

3530. Judge's Comment on the Evidence

Do not take anything I said or did during the trial as an indication of what I think about the evidence, the witnesses, or what your verdict should be.

Now, I will comment on the evidence only to help you decide the issues in this case.

However, it is not my role to tell you what your verdict should be. You are the sole judges of the evidence and believability of witnesses. It is up to you and you alone to decide the issues in this case. You may disregard any or all of my comments about the evidence or give them whatever weight you believe is appropriate.

BENCH NOTES

Instructional Duty

If the court comments on the evidence, the court has a **sua sponte** duty to give this instruction. (Cal. Const., art. VI, § 10; Pen. Code, §§ 1127, 1093(f); *People v. Proctor* (1992) 4 Cal.4th 499, 543 [15 Cal.Rptr.2d 340, 842 P.2d 1100]; *People v. Brock* (1967) 66 Cal.2d 645, 651 [58 Cal.Rptr. 321, 426 P.2d 889], overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13 [189 Cal.Rptr. 159, 658 P.2d 86].)

"[J]udicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Proctor, supra,* 4 Cal.4th at p. 542.)

The judge may comment on the evidence before the case is submitted to the jury or after the jury has announced it is deadlocked. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766 [230 Cal.Rptr. 667, 726 P.2d 113]

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[overruling *People v. Cook* (1983) 33 Cal.3d 400 [189 Cal.Rptr. 159, 658 P.2d 86].)

The judge may comment on the evidence at the sanity phase of a trial. (*People v. Scott* (1960) 53 Cal.2d 558, 563–565 [2 Cal.Rptr. 274, 348 P.2d 882], overruled in part by *People v. Morse* (1964) 60 Cal.2d 631, 638, fn. 2, 648–649 [36 Cal.Rptr. 201, 388 P.2d 33].)

The judge may comment on the evidence at the penalty phase of a capital trial. (*People v. Friend* (1958) 50 Cal.2d 570, 579 [327 P.2d 97], overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13 [189 Cal.Rptr. 159, 658 P.2d 86].) However, *Friend* was decided in 1958, prior to most of the modern case law on capital trials. Thus, the committee recommends proceeding with great caution prior to making any comment on the evidence in the penalty phase of a capital case.

AUTHORITY

- Judge May Comment on Evidence. Cal. Const., art. VI, § 10; Pen. Code, §§ 1127, 1093(f).
- Admonition Required. Cal. Const., art. VI, § 10; Pen. Code, §§ 1127, 1093(f); *People v. Proctor* (1992) 4 Cal.4th 499, 543 [15 Cal.Rptr.2d 340, 842 P.2d 1100]; *People v. Brock* (1967) 66 Cal.2d 645, 651 [58 Cal.Rptr. 321, 426 P.2d 889], overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13 [189 Cal.Rptr. 159, 658, P.2d 86].
- Comments Must Not Direct Verdict and Must Be Fair. *People v. Proctor* (1992) 4 Cal.4th 499, 542 [15 Cal.Rptr.2d 340, 842 P.2d 1100]; *People v. Brock* (1967) 66 Cal.2d 645, 651 [58 Cal.Rptr. 321, 426 P.2d 889], overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13 [189 Cal.Rptr. 159, 658, P.2d 86].
- Judge May Comment After Jury Declares Deadlock. *People v. Rodriguez* (1986) 42 Cal.3d 730, 766 [230 Cal.Rptr. 667, 726 P.2d 113].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 657–662.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.02[2]; Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][c] (Matthew Bender).

(New January 2006)

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3531. Service Provider for Juror With Disability

_____ <*insert name or number of juror*> has been assisted by (a/an) _____ <*insert description of service provider, e.g., sign language interpreter*> to communicate and receive information. The _____ <*insert description of service provider*> will be with you during your deliberations. You may not discuss the case with the _____ <*insert description of service provider*>. The _____ <*insert description of service provider*> is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to _____ <*insert name or number of juror*>.

All jurors must be able to fully participate in deliberations. In order to allow the _____ <*insert description of service provider*> to properly assist _____ <*insert name or number of juror*>, jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to _____ <*insert name or number of juror*>, not to the _____ <*insert description of service provider*>.

[Two _____ <*insert description of service providers*> will be present during deliberations and will take turns in assisting _____ <*insert name or number of juror*>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if a juror will be using the assistance of a service provider in deliberations. (Code Civ. Proc., § 224(b).)

AUTHORITY

- Juror Not Incompetent Due to Disability. Code Civ. Proc., § 203(a)(6).
- Juror May Use Service Provider. Code Civ. Proc., § 224.
- Court Must Instruct on Use of Service Provider. Code Civ. Proc., § 224(b).

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Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.02[2]; Ch. 85, *Submission to Jury and Verdict*, § 85.05[1] (Matthew Bender).

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D. CONCLUDING INSTRUCTION ON SUBMISSION TO JURY

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by

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one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it.

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [130 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

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Give the bracketed sentence that begins with "Do not take anything I said or did during the trial" unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

AUTHORITY

- Exhibits. Pen. Code, § 1137.
- Questions. Pen. Code, § 1138.
- Verdict Forms. Pen. Code, § 1140.
- Unanimous Verdict. Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate. *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge's Conduct as Indication of Verdict. *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind. *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 643–644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court's admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . . may assume such an instruction does not

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> apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the fourth paragraph of this instruction.

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E. ALTERNATES

3575. Substitution of Alternate Juror: During Deliberations

One of your fellow jurors has been excused and an alternate juror has been selected to join the jury.

Do not consider this substitution for any purpose.

The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place.

Now, please return to the jury room and start your deliberations from the beginning.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an alternate juror has been seated. (*People v. Collins* (1976) 17 Cal.3d 687, 693–694 [131 Cal.Rptr. 782, 552 P.2d 742], overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 [127 Cal.Rptr.2d 544, 58 P.3d 391].)

If an alternate juror is seated during the penalty phase of a capital trial but prior to submission of the penalty phase to the jury, give CALCRIM No. 3576, *Substitution of Alternate Juror in Capital Case: After Guilt Determination, Before Submission of Penalty Phase to Jury*.

AUTHORITY

- Statutory Authority to Seat Alternate Juror. Pen. Code, § 1089.

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- Jury Must Be Instructed to Disregard Previous Deliberations. *People v. Collins* (1976) 17 Cal.3d 687, 693–694 [131 Cal.Rptr. 782, 552 P.2d 742], overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 [127 Cal.Rptr.2d 544, 58 P.3d 391]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 559 [113 Cal.Rptr.2d 287].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 512.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, §§ 81.01[2], 81.05[4]; Ch. 85, *Submission to Jury and Verdict*, § 85.05[1] (Matthew Bender).

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3576. Substitution of Alternate Juror in Capital Case: After Guilt Determination, Before Submission of Penalty Phase to Jury

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One of your fellow jurors has been excused and an alternate juror has been selected to take (his/her) place, as provided by law.

For the purposes of this phase of the trial, the alternate juror must accept [all] the verdict[s] and finding[s] returned by the jury in the prior phase[s] of the trial.

In this phase of the trial, you must now determine what penalty is appropriate in light of the prior verdict[s] and finding[s] and all the other evidence that bears on this question. The People and the defendant[s] have the right to a verdict on the issue of penalty that is reached only after full participation of the jurors whose votes determine that verdict. This right may be assured only if the alternate juror participates fully in the deliberations, including any necessary review of the evidence presented in the prior phase[s] of this trial.

BENCH NOTES

Instructional Duty

This instruction may be used if an alternate juror has been seated for the penalty phase of a capital trial. (*People v. Cain* (1995) 10 Cal.4th 1, 66–67 [40 Cal.Rptr.2d 481, 892 P.2d 1224]; *People v. Collins* (1976) 17 Cal.3d 687, 693–694 [131 Cal.Rptr. 782, 552 P.2d 742], overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 [127 Cal.Rptr.2d 544, 58 P.3d 391].) It is unclear if the court has a **sua sponte** duty to give this instruction. (Compare *People v. Cain, supra,* 10 Cal.4th at pp. 66–67 [instruction approved]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 559 [113 Cal.Rptr.2d 287] [court required to give *Collins* instruction when juror substituted during guilt deliberations; noncapital case]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1030 [108 Cal.Rptr.2d 291, 25 P.3d 519] [no error in failing to give instruction on beginning guilt phase deliberations anew where alternate juror seated for penalty phase]). The preferred approach would be to give the instruction when relevant.

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In *People v. Cain* (1995) 10 Cal.4th 1, 64–65 [40 Cal.Rptr.2d 481, 892 P.2d 1224], the trial court gave a longer explanation of what verdicts and findings the alternate juror was required to accept. The committee believes that the second paragraph of this instruction sufficiently explains this concept. However, if the court would like to provide a more detailed explanation, the court may insert the following after that paragraph:

> For (that/those) offense[s] for which the jury returned a verdict of guilty and for (that/those) special circumstance[s] that the jury found to be true, the alternate juror must accept that those matters have been proved beyond a reasonable doubt. [Similarly, for ((that/those) offense[s] for which the jury returned a verdict of not guilty/ [and] for (that/those) special circumstance[s] that the jury found (was/were) not proved), the alternate juror must accept that (that/those) matter[s] (has/have) not been proved beyond a reasonable doubt.] [The alternate juror must also accept the jury's finding at the sanity phase of this trial.]

If the defendant requests an instruction on lingering doubt regarding guilt, the court should review the instruction approved of in *People v. Cain, supra,* 10 Cal.4th at pp. 64–65. However, the court has no sua sponte duty to instruct on lingering doubt. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1030.)

AUTHORITY

- Statutory Authority to Seat Alternate Juror. Pen. Code, § 1089.
- Alternate Juror Seated During Deliberations: Must Be Instructed to Disregard Previous Deliberations. *People v. Collins* (1976) 17 Cal.3d 687, 693–694 [131 Cal.Rptr. 782, 552 P.2d 742], overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 [127 Cal.Rptr.2d 544, 58 P.3d 391]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 559 [113 Cal.Rptr.2d 287].
- Alternate Juror Seated Prior to Penalty Phase. *People v. Cain* (1995) 10 Cal.4th 1, 66–67 [40 Cal.Rptr.2d 481, 892 P.2d 1224]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1030 [108 Cal.Rptr.2d 291, 25 P.3d 519].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 512.

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.24[1] (Matthew Bender).

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3577. Instructions to Alternate on Submission of Case to Jury

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_____ <*insert name[s] or number[s] of alternate juror[s]*>, the jury is now deliberating, but you are still [an] alternate juror[s] and are bound by my earlier instructions about your conduct.

Do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends[, and not even with each other]. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use at its discretion.

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F. FINAL INSTRUCTION ON DISCHARGE OF JURY

3590. Final Instruction on Discharge of Jury

You have now completed your jury service in this case. On behalf of all the judges of the court, please accept my thanks for your time and effort.

Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone.

[I remind you that under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.]

Let me tell you about some rules the law puts in place for your convenience and protection.

The lawyers in this case, the defendant[s], or their representatives may now talk to you about the case, including your deliberations or verdict. Those discussions must occur at a reasonable time and place and with your consent.

Please immediately report to the court any unreasonable contact, made without your consent, by the lawyers in this case, their representatives, or the defendant[s].

A lawyer, representative, or defendant who violates these rules violates a court order and may be fined.

[I order that the court's record of personal juror identifying information, including names, addresses, and telephone numbers, be sealed until further order of this court.

If, in the future, the court is asked to decide whether this information will be released, notice will be sent to any juror whose information is involved. You may oppose the release of this information and ask that any hearing on the release be closed to the public. The court will decide whether and under what conditions any information may be disclosed.]

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Again, thank you for your service. You are now excused.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on discharge of the jury. (Code Civ. Proc., § 206.) The court may give the bracketed portions at its discretion. (*Id.*, § 237.)

Code of Civil Procedure section 237(a)(2) requires the court to seal the personal identifying information of jurors in a criminal case following the recording of the jury's verdict. Access to the sealed records may be permitted on a showing of good cause in a petition to the court, as provided by subdivisions (b) through (d).

Section 14 of the California Standards of Judicial Administration states that "it is appropriate for the trial judge to thank jurors for their public service, but the judge's comments should not include praise or criticism of the verdict or the failure to reach a verdict."

AUTHORITY

- Statutory Authority. Code Civ. Proc., §§ 206, 237.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4][c] (Matthew Bender).

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